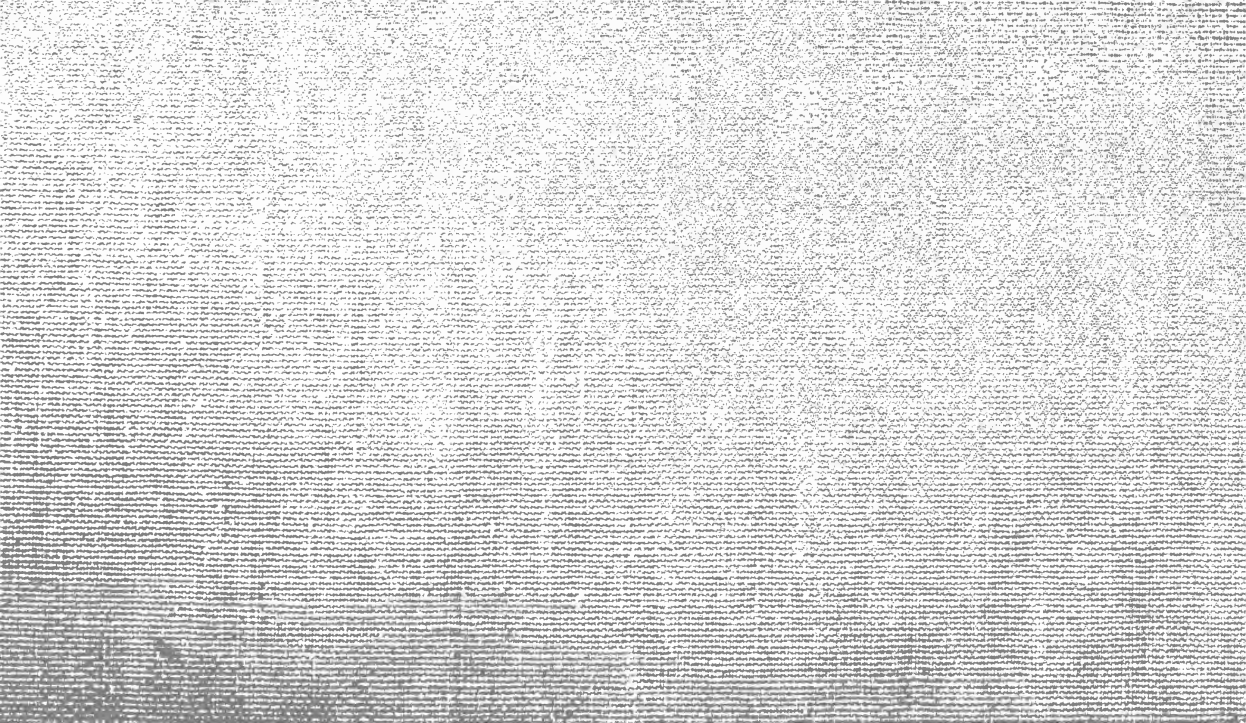

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N. 2951

No. 14909

United States
Court of Appeals
for the Ninth Circuit

MARION JONCICH, JOSEPH C. MARDESICH and ANTONIA DOGDANOVICH,
Appellants,

vs.

ANTHONY VITCO, Appellee.

Transcript of Record

Appeal from the United States District Court for the Southern District of California, Central Division

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif. —12-5-55

No. 14909

United States
Court of Appeals
for the Ninth Circuit

MARION JONCICH, JOSEPH C. MARDESICH and ANTONIA DOGDANOVICH,

Appellants,

vs.

ANTHONY VITCO, Appellee.

Transcript of Record

Appeal from the United States District Court for the Southern District of California, Central Division

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NAMES AND ADDRESSES OF PROCTORS

Proctor for Appellants:

ROBERT SIKES,

1310 Wilshire Boulevard,
Los Angeles 17, California.

Proctors for Appellee:

MARGOLIS, McTERNAN & BRANTON,

112 West Ninth Street,
Los Angeles 15, California. [1*]

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* Page numbers appearing at foot of page of original Transcript of Record.

In the United States District Court for the Southern District of California, Central Division

In Admiralty—No. 16187-WM

ANTHONY VITCO, Libelant,

vs.

MARION JONCICH, JOSEPH C. MARDESICH, ANTONIA DOGDANOVICH, DOE I, DOE II and DOE III, Respondents.

SECOND AMENDED LIBEL

(Under 28 U.S.C. 1916, without prepayment of fees or costs and without security therefor)

Seaman's Libel in Personam for Maintenance, Cure and Share of Catch

To the Honorable the Judges of the above entitled Court:

The libel of Anthony Vitco, late seaman aboard the fishing vessel Pioneer, owned by the respondents above named, against said respondents and all persons intervening in their interests, in a cause of action for share of catch, maintenance and cure, civil and maritime, alleges:

I.

That libelant as a seaman elects to take advantage of the provisions of Title 28, U.S.C., Section 1916 and to proceed herein without prepayment of fees or costs and without security therefor. [2]

II.

That during all the times herein mentioned the respondents above named owned, operated, maintained and controlled the commercial fishing vessel Pioneer which was engaged in commercial fishing in navigable waters off the coast of California and Mexico; that libelant is a resident of San Pedro, California, and that so far as known to libelant the respondents herein known by name, Marion Joncich, Joseph C. Mardesich, and Antonia Dogdanovich, are all residents of the City of San Pedro in the County of Los Angeles, State of California.

III.

That at all times herein mentioned libelant was a fisherman who was employed by the respondents and each of them as a member of the crew of said fishing vessel Pioneer at wages in the form of a share of the proceeds of the catch of said vessel; that said libelant was employed by the respondents pursuant to an oral agreement of hiring for the period of the tuna fishing season of the year 1952.

IV.

That libelant was in the service of the respondents and the aforesaid Pioneer until January 29, 1952, at which time he was compelled to leave the service of respondents and said vessel due to illness, to-wit: A serious heart attack suffered while in the service of said vessel, which illness rendered libelant unable to continue his employment with respondents.

V.

That as a result of the illness suffered by libelant while in the employ of respondents, he was caused and required to, and did receive general medical care and attention, including the services of doctors, x-ray and laboratory examinations, and drugs; that the libelant has incurred obligation for and the expense of said medical care and attention in the amount of Four Hundred and [3] Eighty-Eight ($488.00) Dollars, which said charges are reasonable and fair; that said medical care was not made available to libelant through recourse to the facilities of the United States Public Health Service.

VI.

That since libelant became ill in the service of respondents' vessel and during which period of time it was necessary for him to maintain himself, he incurred expenses for and is entitled to maintenance in the reasonable sum of Eight Dollars ($8.00) daily during such periods of time as he has required medical care for the relief or cure of said illness, or was convalescing therefrom, and during which time he was unable to resume his former occupation of fisherman. That at the time hereof there is now due, owing and unpaid from respondents to libelant as and for maintenance the sum of Five Thousand Five Hundred and Fifty-Two Dollars ($5552.00), being maintenance for a period of six hundred and ninety-four (694) days, that is, from the date of leaving the vessel to the date of filing of the original libel herein.

VII.

That libelant became ill as aforesaid while the Pioneer was engaged in tuna fishing and libelant had been hired by respondents to serve aboard said vessel as a member of the crew during the tuna season of the year 1952. That libelant is entitled to and claims a full share of the catch of said vessel during said tuna season aforementioned. That libelant does not now know the full amount of said share to which he is entitled and, therefore, prays leave of court to amend this libel to show the correct amount thereof when the same has been ascertained, or to offer proof thereof at the time of trial.

VIII.

That all and singular the premises are true and within the admiralty and maritime jurisdiction of the United States and [4] this Honorable Court.

Wherefore, libelant prays that process in due form of law according to the course of this Honorable Court and in causes of admiralty and maritime jurisdiction may issue, and that citation in personam may issue against the respondents or any person claiming any interests in the said Pioneer, and that said respondents or other persons be required to appear and answer upon oath all and singular the matters aforesaid and that this Honorable Court may be pleased to decree the payment by respondents of the sum of Five Thousand Five Hundred and Fifty-Two Dollars ($5552.00) to libelant, together with such further maintenance, ex-

penses of cure and share of catch as may be hereafter ascertained, and with interests and costs of suit herein and such other and further relief as is meet and just in the premises.

Dated: March 31st, 1954.

MARGOLIS, McTERNAN and
BRANTON,
/s/ By LEO BRANTON, Jr.,
Proctors for Libelant [5]

Duly Verified.

Acknowledgment of Service attached. [6]

[Endorsed]: Filed April 5, 1954.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above entitled cause came on regularly for trial on the 23rd day of February, 1955, before the Court, the Honorable William Mathes presiding sitting without a jury, Margolis, McTernan and Branton, by Ben Margolis, appearing as proctors for the libelant and Robert Sikes, Esq., appearing as proctor for the respondents, and the Court having heard the testimony and having examined the proofs offered by the respective parties, and the cause having been submitted to the Court for decision, and the Court being fully advised in the premises now makes its Findings of Fact as follows:

Findings of Fact

1. It is true that at all times herein mentioned the respondents Marion Joncich, Joseph C. Mardesich and Antonia Dogdanovich owned, operated, maintained and controlled the commercial fishing vessel "Pioneer" which was [7] engaged in commercial fishing in navigable waters off the coasts of California and Mexico; that libelant and all respondents at all times herein mentioned were and they now are residents of the City of San Pedro, County of Los Angeles, State of California.

2. It is true that at all times herein mentioned libelant was a fisherman and that in the fall of 1951 he was hired by respondents as a member of the crew of said fishing vessel "Pioneer" at wages in the form of a share of the proceeds of the catch of said vessel and said employment of libelant by respondents was pursuant to an oral agreement of hiring for the period of the tuna fishing season of the year 1952.

3. It is true that libelant was in the service of the respondents and the aforesaid "Pioneer" until January 29, 1952, at which time he was compelled to leave the service of respondents and said vessel due to illness, to-wit, a serious heart attack suffered while in the service of said vessel, which illness rendered libelant unable to continue his employment with respondents.

4. It is true that as a result of the illness suffered by libelant while in the employ of respondents, he was caused and required to, and did receive general medical care and attention, including the

services of doctor, x-ray and laboratory examinations, and drugs; that the libelant has incurred obligation for and the expense of said medical care and attention in the amount of Four Hundred and Eighty-three ($483.00) Dollars, which said charges are reasonable and fair; that of said sum of $483.00 the sum of $348.00 was incurred by libelant for his own account with the physician to whom he was referred by his proctors and the sum of $135.00 was incurred by libelant with the physician to whom he was referred by respondent Joncich, by reason of which reference respondents authorized the private service and consented to bear the said physician's reasonable charge in the sum of $135.00.

5. It is true that after libelant became ill in the service of respondent's vessel and was compelled to leave said vessel on the 29th day of January, 1952, it was necessary for libelant to maintain himself and he is entitled to maintenance from respondents at the agreed rate of $6.00 per day [8] from the time the illness compelled him to leave the vessel on January 29, 1952, until October 15, 1954, when libelant's physician reasonably and in good faith determined for the first time that libelant had reached the state of maximum possible recovery in August of 1954, and that further treatment would not advance cure: that there is now due, owing and unpaid from respondents to libelant as and for maintenance the sum of $5,834.00.

6. It is true that libelant became ill as aforesaid while the "Pioneer" was engaged in tuna fishing and libelant had been hired by respondents to serve

aboard said vessel as a member of the crew during the full tuna season of the year 1952; that libelant is entitled to a full share of the catch of said vessel during said tuna season aforementioned; that the amount due, owing and unpaid from respondents to libelant as and for his share of the tuna catch for the 1952 season of said vessel "Pioneer" is Six Thousand Six Hundred Eighty-one and 95/100 ($6,681.95) Dollars, less appropriate withholding and social security tax deductions as required by law to be withheld and deducted by respondents and paid over by them to the appropriate government agencies.

7. It is true that at all times herein mentioned subsequent to January 29, 1952, libelant was totally disabled.

8. It is true that all and singular the premises are within the admiralty and maritime jurisdiction of the United States and of this Court.

9. It is not true that the contract of employment between libelant and respondents was entered into either as a result of a mutual mistake of fact on the part of libelant and respondents or that it was entered into as a result of a fraudulent concealment by libelant of his actual physical condition. [9]

10. It is true that at the time that the contract of employment was entered into between libelant and respondents there was in full force and effect a collective bargaining agreement by and between said respondents representing the vessel "Pioneer"

and the Fishermen and Allied Workers of America, Local 33, representing fishermen including the libelant, paragraph 5 of which agreement read as follows:

"In the event illness incapacitates any crew member from [10] further work aboard the vessel he shall be entitled to receive his proportionate share of the earnings of the vessel to the date and hour said member leaves the boat. Upon regaining his health, he shall be reemployed on the boat. During illness, such member may be substituted for by another man. An ill member cannot demand his share while ashore. This paragraph does not pertain to a member injured on the boat."

The said paragraph 5 of said collective bargaining agreement is contrary to the established public policy of the Maritime Law to protect from impairment the seaman's historical right to maintenance and cure and to wages for the term of his employment.

From the foregoing facts the Court concludes:

Conclusions of Law

1. Libelant is entitled to judgment against respondents in the sum of $135.00 for medical bills; $5,834.00 for maintenance; and $6,681.95 less appropriate withholding and social security tax deductions as required by law for wages or share of the catch.

2. Libelant is entitled to judgment for his costs and disbursements incurred or expended herein.

Let judgment be entered accordingly.

Dated: This 21st day of May, 1955.

/s/ WM. C. MATHES,
Judge [11]

[Endorsed]: Lodged May 16, 1955. Filed May 23, 1955.

[Title of District Court and Cause.]

ANSWER TO SECOND AMENDED LIBEL

Respondents, Marion Joncich and Joseph C. Mardesich, answer the second amended libel, as follows:

I.

Answering the allegations in Article I respondents deny that libelant is entitled to proceed pursuant to the provisions of Title 28 U.S.C., Section 1916.

II.

Respondents admit the allegations in Article II.

III.

Respondents admit the allegations in Article III with the following proviso: At the time the said oral agreement was made the libelant impliedly represented and warranted to the respondents that he was an able bodied seaman and that he was not afflicted with any disease which would interfere with his performance of said [12] contract. Re-

spondents are informed and believe and therefore allege that at the time of the making of said agreement the libelant was not able bodied but was then suffering from some sclerotic condition involving his heart and that the said contract of employment was entered into either as a result of a mutual mistake of fact on the part of libelant and respondents or was entered into as a result of a fraudulent concealment by libelant of his actual physical condition.

IV.

Answering the allegations in Article IV respondents admit that the libelant left the said vessel on January 29, 1952, and that up to said time, with the exception of periods when he was not required to do any work, he was in the service of respondents pursuant to said purported contract of employment hereinabove referred to. Respondents have no information or belief upon the subject sufficient to enable them to answer the remaining allegations in Article IV and placing their denial thereof upon said ground deny said allegations and each thereof.

V.

Respondents have no information or belief upon the subject sufficient to enable them to answer the allegations in Article V and placing their denial thereof upon said ground deny said allegations and each thereof.

VI.

Respondents have no information or belief upon the subject sufficient to enable them to answer the

allegations in Article VI and placing their denial thereof upon said ground deny said allegations and each thereof and upon the same ground deny that there is now or at all due or owing or unpaid from respondents to libelant as or for maintenance the sum of $5,552.00 or any sum whatsoever or at all.

VII.

Respondents have no information or belief upon the subject sufficient to enable them to answer the allegations in Article VII and placing their denial thereof upon said ground, excepting as hereinabove admitted or alleged, respondents deny said allegations and each thereof. In addition, respondents allege that if said oral contract of employment was valid then the said contract also provided that in the event the libelant became ill while in the service of the vessel he would not be entitled to any share of the catch of said vessel from the date upon which he might leave the same. At the time said purported contract of employment was made it was the custom and practice of the owners of fishing vessels and the members of the crew thereof at the place where said purported contract was made that no fisherman would be entitled to any share of the catch of a vessel from and after the time he might leave the service of such vessel by reason of any actual illness suffered while in the service of such vessel.

VIII.

Respondents deny that all or singular the premises are or that any thereof is true excepting as

hereinabove admitted. Admit that the premises are within the admiralty and maritime jurisdiction of the United States and of this Honorable Court.

Wherefore, respondents pray that the second amended libel be dismissed, that they have and recover any costs of suit herein, and for such other and further relief as the Court may deem proper in the premises.

/s/ LASHER B. GALLAGHER,
Proctor for Respondents, Marion Joncich and Joseph C. Mardesich. [14]

Duly Verified. [15]

[Endorsed]: Filed May 24, 1954.

In the United States District Court for the Southern District of California, Central Division

In Admiralty—No. 16187-WM

ANTHONY VITCO, Libelant,

vs.

MARION JONCICH, JOSEPH C. MARDESICH, ANTONIA DOGDANOVICH, DOE I, DOE II and DOE III, Respondents.

JUDGMENT AND DECREE

(Judgment for Maintenance, Cure and Share of the Catch)

This cause having been brought on for trial before the Honorable William Mathes, Judge of the

above entitled Court, on the 23rd day of February, 1955, the Court sitting without a jury, and the decision of the Honorable William Mathes made in writing having been duly filed herein on the 29th day of April, 1955, finding in favor of Anthony Vitco, libelant, and against Marion Joncich, Joseph C. Mardesich and Antonia Dogdanovich, respondents, and Findings of Fact and Conclusions of Law having been duly made in writing and having been duly filed herein on the 21st day of May, 1955, in accordance with said decision,

Now, Therefore, It Is Hereby Adjudged and Decreed that libelant shall have judgment against respondents in the sum of $135.00 for medical expenses, $5,834.00 for maintenance, and $6,681.95 for libelant's share of the catch less appropriate withholding and social security tax deductions [17] as required by law, to-wit, a total of $12,650.95 less social security and withholding deductions from the share of the catch only, together with $141.65 costs.

Dated: This 21st day of May, 1955.

/s/ WM. C. MATHES,
Judge [18]

Acknowledgment of Service attached.

Docketed and Entered May 24, 1955.

[Endorsed]: Lodged May 16, 1955. Filed May 23, 1955.

[Title of District Court and Cause.]

NOTICE OF APPEAL

The Respondents hereby appeal to the United States Court of Appeals, Ninth Circuit, from the Final Decree of this Court entered herein on May 24, 1955, and from each and every part thereof.

Dated: June 29, 1955.

/s/ ROBERT SIKES,
Proctor for Respondents and
Appellants [19]

Affidavit of Service by Mail attached. [20]
[Endorsed]: Filed June 30, 1955.

[Title of District Court and Cause.]

ORDER ALLOWING APPEAL

The Petition of Respondents for an appeal from the Final Decree entered in the above entitled cause on May 24, 1955, is hereby granted and the appeal is allowed.

It Is Further Ordered that a certified transcript of the record herein be forthwith transmitted to the United States Court of Appeals, Ninth Circuit.

Dated at Los Angeles, California, this 1st day of July, 1955.

/s/ ERNEST A. TOLIN,
United States District Judge

Note: Judge Matthes was out of the district when this was signed—Ernest A. Tolin, J. [21]

Affidavit of Service by Mail attached.
[Endorsed]: Filed June 30, 1955.

[Title of District Court and Cause.]

PETITION FOR APPEAL

To the Honorable William C. Mathes, Judge of the United States District Court, Southern District of California, Central Division:

Respondents respectfully pray that they be permitted to take an appeal from the Final Decree entered in the above Court on May 24, 1955, to the United States Court of Appeals, Ninth Circuit, for the reasons specified in the Assignments of Error which are filed herewith.

Dated: June 29, 1955.

/s/ ROBERT SIKES,
Proctor for Respondents [22]

Affidavit of Service by Mail attached. [23]
[Endorsed]: Filed June 30, 1955.

[Title of District Court and Cause.]

ASSIGNMENTS OF ERROR

Come now the Respondents and hereby assign the following errors in the above entitled proceedings:

I.

The District Court erred in finding that the libelant was hired by respondents for the period of the tuna fishing season of the year 1952.

II.

The District Court erred in failing to find that the libelant was suffering from an acute inflammatory bronchial or pulmonary or pharyngeal esophagitis at the time he left the vessel "Pioneer" on June 29, 1952.

III.

The District Court erred in finding that the libelant suffered a serious heart attack while in the service of said vessel [26] "Pioneer" which rendered libelant unable to continue his employment with respondents.

IV.

The District Court erred in finding that libelant was entitled to maintenance from January 29, 1952, until October 15, 1954, and that there was at the time of the making of the Findings of Fact and Conclusions of Law the sum of $5,834.00 due, owing and unpaid from respondents to libelant as and for maintenance.

V.

The District Court erred in failing to find that libelant was entitled to maintenance, if any, from January 29, 1952, until August 1, 1954, and that there was due, owing and unpaid, if any, from respondents to libelant as and for maintenance, the sum of $5,484.00.

VI.

The District Court erred in finding that libelant had been hired by respondents to serve aboard the

said vessel during the full tuna season of the year 1952; the District Court further erred in finding that the libelant was entitled to a full share of the catch of said vessel during the full tuna season of the year 1952; and in finding that the amount due, owing and unpaid from respondents to libelant as and for his share of the tuna catch for the 1952 season of said vessel was $6,681.95, less taxes.

VII.

The District Court erred in failing to find that libelant, pursuant to the provisions of Paragraph V of Exhibit "D," the collective bargaining agreement between libelant's Union and the respondents, the custom and practice involved, and the shipping articles in evidence, was entitled to no sum whatsoever as his share of the catch during the year 1952.

VIII.

The District Court erred in failing to find, as an alternative [27] to the error hereinabove next referred to, that the libelant was entitled only to a share of the catch for the first half of the year 1952 in an amount of $5,213.91, based on Paragraph XIV of said Exhibit "D."

IX.

The District Court erred in finding that at all times mentioned in the Findings of Fact subsequent to January 29, 1952, that libelant was totally disabled.

X.

The District Court erred in finding that Paragraph V of the said collective bargaining agreement is contrary to the established public policy of the maritime law to protect from impairment the seaman's historical right to maintenance and cure and to wages for the term of his employment.

XI.

The District Court erred in failing to find that said Paragraph V of said collective bargaining agreement was at all pertinent times a valid subsisting and effective provision of said collective bargaining agreement and was binding on the libelant and the respondents.

XII.

The District Court erred in concluding from the Findings of Fact that the libelant was entitled to judgment against respondents in the sum of $5,834.00 for maintenance; in concluding that libelant was entitled to judgment in the amount of $6,681.95, less taxes, for wages or share of the catch; and in concluding that libelant was entitled to judgment for his costs and disbursements therein.

Dated this 29th day of June, 1955.

/s/ ROBERT SIKES,
Proctor for Respondents [28]

Affidavit of Service by Mail attached. [29]
[Endorsed]: Filed July 8, 1955.

[Title of District Court and Cause.]

ORDER EXTENDING TIME TO FILE AND DOCKET APPEAL IN UNITED STATES COURT OF APPEALS

Good cause appearing therefor, It Is Hereby Ordered that the appellants may have to and including September 16, 1955, within which to file and docket their appeal in the United States Court of Appeals.

Dated: August 3, 1955.

/s/ WM. C. MATHES,
United States District Judge [30]

[Endorsed]: Filed August 4, 1955.

[Title of District Court and Cause.]

CITATION ON APPEAL

United States of America—ss.

To: Anthony Viteo, and to his Proctors, Margolis, McTernan and Branton—Greeting:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be held at the City of Los Angeles, in the State of California, on the 16th day of September, A.D. 1955, pursuant to an order allowing appeal filed on July 1st, 1955, in the Clerk's office of the District Court of the United

States, in and for the Southern District of California, in that certain Cause No. 16187-WM, Central Division, wherein Marion Joncich, Joseph C. Mardesich and Antonia Dogdanovich are appellants and you are appellee, to show cause, if any there be, why the decree, order or judgment in the said appeal mentioned, should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness, the Honorable William C. Mathes, United States District Judge for the Southern District of California, this 8th day of August, A.D. 1955, and of the Independence of the United States, the one hundred and seventy-ninth year.

JOHN A. CHILDRESS, Clerk,
U.S. District Court, Southern District of California

/s/ EDW. DREW, Deputy.

Service of a copy of the foregoing Citation and copies of Petition for Appeal, Order Allowing Appeal, Assignments of Error, Praecipe and Order Extending Time to File and Docket Appeal in United States Court of Appeals is acknowledged this 8th day of August, 1955.

/s/ LEO BRANTON, Jr., for
Margolis, McTernan and Branton,
Attorney for Appellee [31]

[Endorsed]: Filed August 10, 1955.

[Title of District Court and Cause.]

BOND ON APPEAL
(Supersedeas and for Costs)

Know All Men By These Presents:

Whereas, respondents Marion Joncich, Joseph C. Mardesich, and Antonia Dogdanovich have appealed or are about to appeal from that certain Final Decree heretofore made and entered in the above entitled cause on May 24, 1955; and

Whereas, Fireman's Fund Indemnity Company, a corporation, organized and existing under and by virtue of the laws of the State of California and qualified to act as a surety in this Court, is held and firmly bound unto the Libelant herein and unto whom it may concern in the sum of Fourteen Thousand Dollars ($14,000.00), for the payment of which well and truly to be made it does hereby bind itself, its successors and assigns firmly by these presents and agrees that in case of default on the part of the said appellants, Marion Joncich, Joseph C. Mardesich and Antonia Dogdanovich, in the payment of the satisfaction of the judgment in full heretofore [32] entered, together with all costs, interests and damages for delay, the said Fireman's Fund Indemnity Company, a corporation, will make such payment in full if for any reason the said appeal is dismissed or if the judgment is affirmed, and further agrees to pay in full in the event of any default therein on the part of the said appellants such modification of the judgment and such costs,

interests and damages as the Appellate Court may adjudge and award herein.

The condition of this obligation being that if the above-named appellants shall successfully prosecute their said appeal, then the above obligation on the part of Fireman's Fund Indemnity Company shall be void; otherwise, the same shall be and remain in full force and effect.

Dated: July 22, 1955, at Los Angeles, California.

FIREMAN'S FUND INDEMNITY COMPANY,
/s/ By JOHN M. ARNOTT,
Attorney-in-Fact

Examined and recommended for approval as provided in Rule 13.

/s/ ROBERT SIKES,
Proctor for Respondents and Appellants Marion Joncich, Joseph C. Mardesich, and Antonia Dogdanovich.

I hereby approve the foregoing bond this 30th day of August, 1955.

/s/ WM. C. MATHES,
United States District Judge [34]

The premium charged for this bond is 260 dollars per annum.

Notary Public's Certificate attached.

[Endorsed]: Filed August 30, 1955.

[Title of District Court and Cause.]

BOND ON APPEAL
(Supersedeas and for Costs)

Know All Men By These Presents:

Whereas, respondents Marion Joncich, Joseph C. Mardesich, and Antonia Dogdanovich have appealed or about to appeal from that certain Final Decree heretofore made and entered in the above entitled cause on May 24, 1955; and

Whereas, Fireman's Fund Indemnity Company, a corporation, organized and existing under and by virtue of the laws of the State of California and qualified to act as a surety in this Court, is held and firmly bound unto the Libelant herein and unto whom it may concern in the sum of Fourteen Thousand Dollars ($14,000.00), for the payment of which well and truly to be made it does hereby bind itself, its successors and assigns firmly by these presents and agrees that in case of default or contumacy on the part of the said Appellants, Marion Joncich, Joseph O. Mardesich and Antonia Dogdanovich, execution may issue against them, their goods, chattels [35] and lands;

Now, Therefore, the condition of this obligation is such that if the above named Appellants shall prosecute their appeal with effect and answer all damages and costs if they fail to make their plea

good, then this obligation shall be void; otherwise the same shall be and remain in full force and effect.

Dated: Los Angeles, California, this 6th day of July, 1955.

FIREMAN'S FUND INDEMNITY COMPANY,

/s/ By A. I. STODDARD,
Attorney-in-Fact

Examined and recommended for approval as provided in Rule 13.

/s/ ROBERT SIKES,
Proctor for Respondents and Appellants Marion Joncich, Joseph C. Mardesich, and Antonia Dogdanovich.

I hereby approve the foregoing bond this 7th day of July, 1955.

/s/ LEON R. YANKWICH,
United States District Judge. [35]

Notary Public's Certificate attached. [36]

[Endorsed]: Filed July 7, 1955.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, John A. Childress, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered 1 to 36, inclusive, contain the original Second Amended Libel; Findings of Fact and Conclusions of Law; Answer to Second Amended Libel; Judgment and Decree; Notice of Appeal; Order Allowing Appeal; Petition for Appeal; Praecipe; Assignments of Error; Order Extending Time; Citation; Bond on Appeal (2) which, together with the original defendants' exhibits A-D, inclusive and plaintiff's exhibits 1-6, inclusive; and two volumes of reporter's transcript of proceedings, in the above-entitled case constitute the transcript of record on appeal to the United States Court of Appeals for the Ninth Circuit, in said cause.

I further certify that my fees for preparing the foregoing record amount to $2.00, which sum has been paid by appellants.

Witness my hand and the seal of said District Court, this 19th day of October, 1955.

[Seal] JOHN A. CHILDRESS,
Clerk
/s/ By CHARLES E. JONES

In the United States District Court for the Southern District of California, Central Division

In Admiralty—No. 16187-WM

ANTHONY VITCO, Libelant,

vs.

MARION JONCICH, JOSEPH C. MARDESICH, ANTONIA DOGDANOVICH, DOE I, DOE II and DOE III, Respondents.

TRANSCRIPT OF PARTIAL PROCEEDINGS

Los Angeles, California, Feb. 23, 1955

Honorable William C. Mathes, Judge presiding.

Appearances: For Libelant: Margolis, McTernan & Branton, by Ben Margolis, 112 West Ninth St., Los Angeles 15, California. For the Respondents: Robert Sikes, 1256 West First St., Los Angeles 26, California. [1*]

(Opening statements made by counsel.)

ANTHONY VITCO

called as a witness by the libelant, being first sworn, was examined and testified as follows:

The Clerk: Will you state your name?

The Witness: Anthony Victo.

Direct Examination

Q. (By Mr. Margolis): Mr. Vitco, just sit back and relax, please. And if you should get tired, just

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* Page numbers appearing at top of page of original Reporter's Transcript of Record.

(Testimony of Anthony Vitco.)

tell me. Now, try to speak so that all of us can hear you. Try to keep your voice up. Where do you live, Mr. Vitco? A. In San Pedro.

Q. What address?

A. 1082 West 13th Street.

Q. When and where were you born?

A. I was born in Yugoslavia in 1897, the 26th of December.

Q. How long did you live in Yugoslavia, until what year? A. Until 1921.

Q. And where did you come at that time?

A. I came in 1921, in July, in the United States.

Q. And you have lived in the United States ever since, have you, Mr. Vitco? A. Yes, sir.

Q. Now, what education did you have?

A. I have sixth grade of grammar schooling in Europe.

Q. And did you have any education in the United States? A. No, sir.

Q. Did you have any education preliminary to obtaining your citizenship papers?

A. Yes, sir. I went to school there for about a month—night school.

Q. Now, when did you first go to work, and what kind of work?

A. When I first came in this country?

Q. No, when you first went to work, whether it was in this country or elsewhere?

A. I went to work on a ship when I was 12 years old, in Europe.

Q. What kind of work?

(Testimony of Anthony Vitco.)

A. Well, I was a mess boy at that time.

Q. Did you continue to work at that job all the time you were in Europe?

A. Well, yes, until I got drafted.

Q. And you were in the army in World War I?

A. Yes, I was.

Q. For how long?

A. I was two years in the army and two years prisoner—four years all together.

Q. Then when you got out of the army did you go back to that kind of work?

A. For a short time until I got my sister's paper to come over to this country.

Q. When you came to the United States to what city did you come first of all?

A. I land in New York and then I came to my sister in Seattle, Washington.

Q. Did you go to work shortly after you came here? A. Three days after I came here.

Q. What kind of work?

A. Well, at that time I went to work in a lumber yard, in a sawmill.

Q. How long did you do that?

A. For about a year.

Q. Then what did you do?

A. Then I went fishing, in my trade as a cook.

Q. When you say you went fishing as a cook, you will be referring, I think, to other times that you went fishing. During all the time that you have been fishing have you always shipped out as a cook?

A. Yes, sir.

(Testimony of Anthony Vitco.)

Q. What was that, about 1922 that you started fishing as a cook?

A. '22. I believe so—'22 or '23. It would be '22 or '3. '22, I think.

Q. And did there come a time when you moved to San Pedro?

A. In 1924, in fall; or '25.

Q. In 1924 or '25?

A. That's right. '5.

Q. All right. Have you lived in San Pedro ever since? A. Ever since.

Q. Now, during the time that you have lived in San Pedro have you also continued to work on fishing boats as a cook?

A. All the time, yes, sir.

Q. Have you engaged in any other occupation?

A. No, sir. Always I did cooking, fishing.

Q. I wonder if you could tell his Honor briefly what a cook does on a vessel, a fishing vessel? What his duties are?

A. His duties are to cook as many meals—if it's 12 hours a day work, he cooks three meals. And he helps with the fish, with the net.

Q. Anything else? [6]

A. Well, he have to carry provisions, beer and meat and potatoes from the pilot house down to the galley, because we have boxes on the pilot house. And everything; bake,—everything.

Q. And does the work, does that involve heavy lifting?

A. Sometimes it does, sir. Sometimes you work

(Testimony of Anthony Vitco.)

with the freezer where you have to prime your door open because it is froze. And then you use your arms to pull that. Sometime you take a sack of 100 pound potatoes and move that over. Boxes of beer and 7-up. It's hard. All depends on how strong you are.

Q. What part of the fishing operations does the cook engage in?

A. In the fishing operation, I would say me and Mr. Mardesich and a couple other guys will pass the fish, when we catch a hundred tons of fish, that is our job, to pass all that fish to the main hold, to the boys that are icing the fish down. Plus, I have to do the cooking and mix drinks and cooking and washing and help the boys. Because if I don't help on the deck there is two guys idle, they couldn't do any work because I have my special main hole where I pass the fish.

Q. Now, from 1925 until 1952 did you ever miss a single season of fishing?

A. A season? Never, sir. Never a season. [7]

Q. Did you miss parts of seasons because of illness? A. Yes, sir, I did.

Q. I am talking now about the period from 1925 to 1952. You understand that?

A. Between 1925 and 1952, yes.

Q. Do you remember when or about when was the first illness that you had that you missed some time at work?

A. I remember about two months and a half in '48.

(Testimony of Anthony Vitco.)

Q. Do you remember one in 1934?

A. In San Francisco? I missed about three or four days once in San Francisco.

Q. Well, maybe I can—do you remember having tonsil trouble?

A. Yes, sir. Well, I missed only one trip that time.

Q. What year was that?

A. That was in '34, sir.

Q. You had your tonsils removed?

A. Yes, sir. I sent another man in my place, to remove my tonsils and just lost one trip, sir. I didn't get paid for that because the other man got that.

Q. Now, a trip usually lasts four to six weeks, is that right?

A. They made it in 31 days at that time. I was well to go back. I went back.

Q. You went back on the same boat? [8]

A. On the same boat.

Q. Do you remember an illness in 1939 when you were working in San Francisco?

A. Yes, I do.

Q. And did you have the flu at that time?

A. I had a temperature of 101. Had a little cold. And I went in the Marine Hospital to take a check and the doctor says, "You got some temperature. You better go off here for a couple of days." I went up there three days and they released me and I went fishing back again.

Q. You missed three or four days? You were

(Testimony of Anthony Vitco.)

an inpatient, were you, at the Marine Hospital in San Francisco? A. That's right.

Q. About 1939? A. Must have been.

Q. Did you again miss some time in 1945, six years later. Do you remember when you were fishing on the White Rose?

A. Oh, yes, sir. I did miss that time. Yes, sir. I went to hospital for about seven days. I think I had a little operation that time.

Q. What kind of an operation was it?

A. Well, Dr. Belt thought that I had something in—like a little rock or stone or something—I don't know. Was insured, and he—— [9]

Q. Where? What part?

A. In the bladder, sir.

Q. You had a little bladder operation?

A. That's right. It was very small.

Q. How long were you off work then?

A. Oh, we were fishing locally here, sir.

Q. For how long were you off work?

A. Not too long; very little time. In a week's time—I, of course, took a month off that time, for sure. I must have been off about a month. They were fishing local here. If they were ready to go down south, I would be ready to go.

Q. Did you again go back to the same boat you were working on? A. Yes, sir.

Q. Now, was the next time that you were sick three years later in April 1948?

A. In '48, sir, I got sick on the same boat on Pioneer down by Acapulco in '48.

(Testimony of Anthony Vitco.)

Q. Were you fishing down by Acapulco?

A. That's right.

Q. And you got sick while you were on the boat? A. Yes, sir.

Q. What happened then?

A. Well, it was very hot down there at that time, and I was supposed to keep my skipper on a diet, Mr. Joncich, and [10] I have to use—every time when I use steaks or lamb chops he wants it to be broiled. While this stove—we didn't have gas range, we had oil range. I have to make all the top grade in order to brown the little chops or steak in the oven, so with all the heat we have outside and inside the small galley I got roasted there in a week's time and then I must have passed out and I got so weak I couldn't eat from big heat and they sent me home.

Q. How much time were you off then?

A. I lost that time, if I am not wrong, a couple of months, because they hire another cook. I was ready to go back in a month but the skipper say, "Well, we will give this cook a chance to make a little more money." So he kept me home for about two trips, I think. I went back again on the same boat, sir.

Q. From 1948 until 1952, following that illness in 1948, did you miss any time at all?

A. I don't believe so, sir. I don't think so.

Q. Now, were you ill or were you having some health difficulties in the latter part of 1951?

A. Sir, not—I didn't stop working. I had a lit-

(Testimony of Anthony Vitco.)

tle cold, a tickle of the throat, and that didn't deprive me of my work. I work every day. Didn't have no temperature or anything that would keep me idle. I was working. And I went to doctor and he gave me some—he says I had a little cold, [11] ticklish throat, and he gave me some medicine, some green medicine to take three—every three hours teaspoonful. And to be frank with you, I think in a day or two that clears up and——

Q. Well, during that time did you go to the United States Public Health Service a few times?

A. Oh, yes, I did. But that was before I went to——

Q. And then you went to a private doctor?

A. That's right. I went to U.S. and he told me, "There is nothing wrong with you."

He says, "You are fit for duty." He says, "You got little bronchitis like any fisherman. But you are okay." He says, "Go ahead."

He didn't give me nothing for a cold, sir. And then this other fellow, this doctor gave me this other medicine, it was very good for me. He fixed me up there.

Mr. Margolis: All right. I have already shown to counsel, and I have here an abstract from the United States Public Health Service, your Honor, covering the period 9/4/51 to 11/16/51 for Mr. Vitco, showing they found him fit for duty as of that time. And I would like to offer that in evidence for the purpose of showing that he was found fit for duty.

(Testimony of Anthony Vitco.)

Mr. Sikes: If the court please, at this time I have no objection to the diagnosis shown thereon. But I certainly [12] want to make my position clear. With regard to other United States Public Health records, I do not wish to waive my right to object to them on the grounds that they do contain a diagnosis and they are not admissible under the law. I will not object to this particular one, though.

The Court: As to it, do you stipulate that it is a genuine document and in all respects that it purports to be?

Mr. Sikes: That is correct.

The Court: Very well. It may be received in evidence as Libelant's Exhibit—1?

The Clerk: 1, your Honor.

(The exhibit referred to was received in evidence and marked Libelant's Exhibit 1.)

Q. (By Mr. Margolis): Now, Mr. Vitco, up to the time that you went fishing in December of 1951, had any doctor or any hospital or anyone at all ever told you that you had any kind of heart trouble? A. Never, sir.

Q. During the period of time that you worked in San Pedro from 1925 to 1952, what kind of vessels did you ship on? By that I mean for what did they fish?

A. When we were fishing sardines, I used to fish sardine season locally, which is in San Francisco and Pedro; and also every season I went down for tuna.

(Testimony of Anthony Vitco.)

Q. Do you know whether there are boats or have [13] been in San Pedro during the period of time you were fishing, boats which fish sardines part of the year and tuna part of the year and other boats which fish tuna all year round?

A. I fish on both of those kind of boats.

Q. But there were boats that fished tuna all year round?

A. All the year round, and smaller ones, particularly sardines and tuna.

Q. Now, involved here is the vessel Pioneer. In 1951 what kind of a vessel was that from the standpoint of the kind of fishing it engaged in?

A. Mr. Joncich, in '51, when he asked me to come——

Q. What kind of fishing was it?

A. Strictly tuna.

Q. Year round tuna?

A. Year round tuna.

Q. From your knowledge of the fishing industry, gained from working in it during this approximately 27-year period in San Pedro, I will ask you whether you know whether there is a custom with respect to men who are employed on a boat doing work on that boat before it starts out on a fishing trip?

A. Yes, it is custom. That is our job, to prepare the boat.

Q. Now, taking the tuna boat which goes fishing all year round, generally what time of the year is that work done on the boat? [14]

(Testimony of Anthony Vitco.)

A. They usually—we usually prepare our boats before Christmas.

Q. And about how long a period of time does it take to prepare the boats?

Mr. Margolis: Excuse me, your Honor. There may be no dispute about this.

Mr. Sikes: I am perfectly willing to stipulate there is this period before a boat actually goes out in which, your Honor, certain necessary preparations must be done. And that regards the net, among other things; and that there is this period in here in which they are within the service of the vessel.

The Court: That period involves, customarily, how much time?

Mr. Sikes: Well, I can't say that.

Mr. Margolis: Well, would it be correct, if I asked Mr. Mardesich, to be from four to six weeks?

Mr. Mardesich: The union allows a man to work six days.

Mr. Sikes: Before the vessel——

Mr. Margolis: Preparing the boat.

Mr. Mardesich: The net is usually prepared in four days.

Mr. Sikes: And the net in four days.

Mr. Margolis: We had better put on testimony, your Honor.

Q. (By Mr. Margolis): Mr. Vitco, what is the practice——

Mr. Margolis: Your Honor, I won't go into the details [15] on which there is in effect an agreement. I will just go into the time factor.

(Testimony of Anthony Vitco.)

One more thing. That covers such things as painting the boat, getting it cleaned up, and so forth. I think we agree on that.

Mr. Sikes: That's correct.

Mr. Margolis: Getting the provisions on.

The Court: And that is performed by the fishermen who are employed for the season with a share of the catch, is that correct?

Mr. Sikes: That is done by the fishermen who are employed for——

Mr. Margolis: Well, employed to go fishing.

Mr. Sikes: Who are employed to go fishing, yes, sir, for a share of the catch.

Mr. Margolis: Our contention is that the custom is that it is for the season, but the stipulation doesn't cover that, your Honor.

Q. (By Mr. Margolis): Mr. Vitco, how long does this work usually take?

A. Mr. Margolis, I don't know nothing about the low, but if you can ask Mr. Mardesich how long we work——

Q. Mr. Vitco, let me explain something to you. Let's not try to argue with anybody here. If you will just try to answer my question. My question is this: I am not asking [16] about 1951 at this time. I am asking you what the custom is as to how long it usually takes.

A. Okay, sir. It takes a month or two. All depends on how much work is to be done on the net and on the boat.

(Testimony of Anthony Vitco.)

Q. And for this work the men receive no compensation, is that right?

A. No transportation or nothing. You have to pay your own transportation and your own board and everything else for this. When you bring the fish in that is deducted out of your fish, whatever you spent those days aboard——

Q. For food? A. ——for food.

Q. It is the custom, is it not, on these boats for men to buy food collectively and pay for their food out of their share of the catch, is that right?

A. Yes, sir.

Q. And that food includes the food that is eaten while the boat is being gotten ready to go out?

A. That's right, sir.

Q. Now, is there a custom as to the period for which the men who work preparing the boat——

Mr. Margolis: Well, I will withdraw that.

Q. (By Mr. Margolis): Is it customary to do this once a year or less than once a year or more than once a year, as far as fixing up the boat is concerned? [17]

A. The rule is—the custom is once a year.

Q. For boats that fish tuna only?

A. For boats that fish tuna only.

Mr. Sikes: Well, if the court please, I would appreciate it if Mr. Margolis would let him finish his answer before he suggests the next part of it—inadvertently suggests the next part.

Mr. Margolis: I think counsel is right, your Honor. I shouldn't have done that. My question

(Testimony of Anthony Vitco.)

wasn't complete, because there is a difference between the two types of boats.

Mr. Sikes: Yes.

Mr. Margolis: All right.

Q. (By Mr. Margolis): And what custom, if any, is there that you are familiar with with respect to the employment of the men, the period for which they are employed, these men who do the work getting the boat ready, on boats that fish tuna only?

A. When a skipper—when a captain would ask you if you want to go fishing for tuna, that means until the end of the season, tuna season. If it's October, November or December, whatever he stop and take his net, tuna on shore, that is end of that season. That is custom that we fishermen take.

Mr. Sikes: I am going to move that the answer be [18] stricken, your Honor, on the grounds that it is obviously a conclusion; second, that it is uncertain in that we cannot determine if it is applicable to this particular boat; and thirdly, it is incompetent because there wasn't a sufficient foundation laid. And I move that the entire answer be stricken.

The Court: Motion denied. You may cross examine the witness.

Mr. Sikes: All right, sir.

Q. (By Mr. Margolis): Was that the custom, as far as your knowledge of the industry is concerned, that was in effect in 1951 when you went to work on the Pioneer?

A. That's the custom, Mr. Margolis.

(Testimony of Anthony Vitco.)

Q. Now, did you have a conversation with anyone from the Pioneer about going to work on that boat before you went to work? Just answer that yes or no. A. Yes, sir.

Q. With whom did you have that conversation?

A. With the owner, Mr. Joncich.

Q. And do you remember where that conversation was held?

A. That was on Fishermen's Wharf, right in front of the boat—was tied up alongside.

Q. Fishermen's Wharf in San Pedro where all the boats are tied? [19]

A. That's right.

Q. Was anybody else present at the time besides yourself and Mr. Joncich?

A. Well, no, sir. I was talking to a man but he called me on the side to talk to him.

Q. So at the time of that conversation there was just the two of you?

A. Just the two of us.

Q. Can you fix the date. I don't mean exactly.

A. I don't know. It must have been in October. I think about 15 days at least before we went to work, at least that. We fixed the net. Must have been October in '51.

Q. Now, will you tell us what was said by Mr. Joncich and what was said by you?

A. Well, Mr. Joncich, as I fished with him before on the same——

Q. You had worked with Mr. Joncich on the Pioneer before?

(Testimony of Anthony Vitco.)

A. About two years before, yes, sir. He asked me if I would want to go fishing tuna this year with him. I told him no, I didn't want to go.

Well, he says, "Where you going?"

I told him, "I might go to San Diego, fish on Normandy." Because I did fish on Normandy one trip before.

He says, "Why you want to go to San Diego? You know you can make $10,000 with me this year. I'm going with you guys, [20] too." And talk and talk and talk, and finally I say yes and I accepted.

Q. Do you recall about when it was that you started working on the boat?

A. On the boat? Mr. Margolis, we started, if I am not mistaken, I believe in November. But I am not sure what day in November.

Q. Can you tell us, the early part, the middle part,——

A. The early part, yes, sir. As I stated, we work over a month on the boat, so it must have been November 1st or 2nd, in that line; 5th—or, I am not sure. But I know it was right start of November.

Q. All right. Now, you did the kind of work that you described, the cooking, is that right?

A. Did the same work as I did 20 years ago, all the time. I mean, work, cooking, help them on the net a little bit when I had a little time. I cleaned all my galley benches, boxes, got ready for provisions, because we usually take two months' to

(Testimony of Anthony Vitco.)

three months' provisions on those boats, for 12 men. You have to have everything ready.

Q. And you had to put the provisions away, is that right?

A. When we were ready to sail, yes, sir.

Q. From the time that you started to work about how long a period was it that you worked on the boat, getting it [21] ready, doing all these things you told us about?

A. I figured more than a month. But I know I worked more than a month.

Q. How many days a week?

A. I even came down on Sunday, every day of the week. I even came down on Sunday to work.

Q. Did you miss any time, any regular time of work during that period? Did you take any days off? A. Not one minute, Mr. Margolis.

Q. Now, there finally came a time the boat was all ready to go, is that right? A. Yes.

Q. What date did the boat leave?

A. We left December the 27th, I believe, in '51.

Q. Now, before you left did you sign any papers or any kind?

A. It's customary every year we sign some kind of a crew list or something. I don't know what it is. But we sign our name on a piece of paper. Every man have to sign his name there—crew member. But I don't know what it is. Every year I sign that kind of paper.

Q. As far as you remember did you sign one this trip? A. Yes, I did.

(Testimony of Anthony Vitco.)

Q. By the way, you said it is customary to do this. Is it customary every trip you take to Mexico, or once a [22] season?

A. Once a season that I remember, sir.

Mr. Sikes: I am going to object to that answer and move that it be stricken on the grounds that it is again uncertain as to what is meant by "season." Now, I don't know whether he is talking about a month, or what he is talking about.

Mr. Margolis: Well, maybe I can straighten that out so we don't have the difficulty counsel has.

Q. (By Mr. Margolis): If you start fishing, you finish fixing up the boat and you are ready to go out and you sign before you go out.

A. Yes, sir.

Q. Now, the boat will make quite a number of trips before it's laid up again, will it not?

A. Mr. Margolis, we go season——

A. Well, Mr. Vitco, just listen to my question. My question is very simply this: When you start fishing after you fix the boat up and you are going to Mexico, the fishing is in Mexican waters, by the way, is it? A. Yes, for tuna.

Q. You are going to Mexico. You make quite a few trips, don't you, before the boat is laid up again and you go through the business of fixing up the boat again? A. Oh, yes.

Q. How long does each trip ordinarily take?

A. Well, on this particular boat, sometimes make some fast ones; month, two, 40 days, 12 days,

(Testimony of Anthony Viteo.)

15—all depends on how lucky you are, Mr. Margolis.

Q. Two months is a long trip?

A. Two months usually is a long trip.

Q. Now, when you go to work on a boat, before you go out the first time, you sign this crew list, or whatever it is? A. That's right, sir.

Q. Now, do you sign it again until after the boat is laid up and you start all over again?

A. In all my years fishing I never remember that I signed another one until next year, until next tuna season.

Q. Until the next time the boat had been laid up and you started out again?

A. That's right, until next year.

Q. Now, how did you feel physically at the time that the boat left San Pedro on December 27, 1951?

A. Mr. Margolis, I felt like I always did—fine, capable of doing my work. I felt good, otherwise I wouldn't have went down in Mexico. Very dangerous to go down there sick.

Q. Now, did there come a time within a few days when you became sick?

A. That's right, sir. [24]

Q. Now, when was that? About how long after the boat left on December 27th?

A. Well, it wasn't too long, sir. We were on Guadalupe Island, and we left the island——

Mr. Margolis: Mr. Viteo, I think it is our recess time. We will pick it up here.

The Court: We will recess until 2:00 o'clock.

(Whereupon a recess was taken until 2:00 o'clock p.m. of the same day.) [25]

Wednesday, February 23, 1955; 2:00 p.m.

The Court: Are there ex parte matters?

The Clerk: No, your Honor.

Mr. Margolis: Ready, your Honor.

The Court: You may proceed.

Mr. Margolis: Your Honor, with the court's permission I shall temporarily ask that Mr. Vitco be excused from the stand, and I would like to call Dr. Abowitz.

The Court: You may.

MURRAY ABOWITZ

called as a witness by the libelant, being first sworn, was examined and testified as follows:

The Clerk: Give us your full name.

The Witness: Murray, M-u-r-r-a-y, Abowitz, A-b-o-w-i-t-z.

Mr. Magnolis: Your Honor, before proceeding with the examination of Dr. Abowitz, I would like to offer certain exhibits to which the examination will in part pertain. And these are exhibits which are referred to in the pretrial stipulation. The foundation is stipulated to them. They are an exchange of radiograms between the Coast Guard and the vessel Pioneer, involved in this case, dated January 3rd and 5th, I believe; 3rd, 4th and 5th.

I would like to offer these as a single exhibit.

(Testimony of Murray Abowitz.)

They are fastened together. There are six radiograms. [26]

Mr. Sikes: If the court please, I have no objection to those going in, but I will not stipulate that those are all of the messages between the Pioneer and the Coast Guard.

Mr. Margolis: I do not ask for such a stipulation.

The Court: Very well. They are received in evidence as Libelant's Exhibit——

The Clerk: No. 2, your Honor.

The Court: ——No. 2.

(The documents referred to were received in evidence and marked Libelant's Exhibit No. 2.)

Direct Examination

Q. (By Mr. Margolis): Dr. Abowitz, what is your address?

A. 6333 Wilshire Boulevard, Los Angeles.

Q. You are a physician and surgeon duly authorized to practice medicine and surgery in the State of California, and licensed for that purpose?

A. I am.

Q. Doctor, will you give us, briefly, your educational background?

A. I studied medicine at the University of Vienna and received my medical degree in 1937. Upon returning to this country, in California, I had a year's internship and a year's residency and went into practice, practice of internal medicine, approxi-

(Testimony of Murray Abowitz.)

mately 1942, and have practiced continuously [27] since then.

Q. What did you do in the years between 1937 and 1942, Doctor?

A. Internship and residency and a couple of years of training in X-ray to become an X-ray specialist — which I abandoned to go into internal medicine.

Q. And since 1942, Doctor, have you practiced internal medicine continuously here in the City of Los Angeles? A. I have.

Q. And in connection with that practice have you had occasion, Doctor, to treat patients who have complained, or who actually had heart trouble at one time? A. I have.

Q. Has that been a substantial part of your practice?

A. Yes, it's one of the common diseases one sees in the medical practice.

Q. Did you see and examine the libelant in this case, Anthony Vitco? A. I did.

Q. When was the first time that you saw Mr. Vitco?

A. In March 1952, I first examined him in my office.

Q. Can you be more specific as to the dates?

A. March 27, 1952.

Q. At that time did you examine Mr. Vitco?

A. I did. [28]

Q. Did your examination consist in part of the obtaining of a history? A. That's correct.

(Testimony of Murray Abowitz.)

Q. Will you tell us what history you obtained at that time, Doctor?

Mr. Sikes: I am going to object to that question, your Honor, on the grounds that—I don't know what history is coming up, of course, whether it has to do with anything that has to do with shares or anything else.

Mr. Margolis: I am talking about medical history.

Mr. Sikes: Purely medical history.

I will withdraw my objection.

Q. (By Mr. Margolis): Did you go into anything else besides medical history, Doctor?

A. I am certain I did not.

Q. In any event, confine yourself to that.

A. The patient gave a history of severe chest pain, chiefly under the breast bone, which had begun rather suddenly about January 2, 1952. He described the pain which had occurred on frequent occasions as radiating from the breast bone, up to the left shoulder, down the left arm and as far down as the left wrist. This pain was accompanied by a choking, strangulating sensation and was also accompanied by breathlessness. The pain was related almost entirely to exertion. That is, exertion would bring on the pain and with [29] rest it would subside.

He also gave me a history of having seen—this had occurred while he was working on a fishing boat as a cook in the waters off Mexico; perhaps off Lower California, I don't recall.

(Testimony of Murray Abowitz.)

In the history he gave it was stated that he had seen a physicia*l* in Lower California about January 24th and that he had been taken off the boat and flown back to San Pedro on January 27, 1952. He had been placed under treatment by a chiropractor for about six weeks, who had then referred him to an osteopath, who had examined him and gave him some pills, little white pills, which were placed under the tongue, which relieved the pain.

Q. Do you know what those pills were, Doctor?

A. No. But a fairly good guess would be that it was nitroglycerin, which is one of the few medications that is ever given under the tongue and which relieves that type of pain.

Mr. Sikes: May I move that the answer go out as not responsive and a conclusion of the witness?

The Court: That is your opinion, Doctor?

The Witness: Yes, that is my opinion.

The Court: Of what it was?

The Witness: Yes.

The Court: Is the point of your objection that the doctor [30] isn't competent to express that opinion?

Mr. Sikes: To express an opinion of what is in a pill which has been given sometime before; that, sir. As he said, it is a guess. I believe he said that.

The Witness: That is correct.

The Court: Now, it is transformed to an opinion, is that correct, Doctor?

The Witness: Well, it is very difficult for me to say what a medication is. But there are so few

(Testimony of Murray Abowitz.)

things that are given a patient to take under the tongue, it is a rather good opinion. I might qualify it was an opinion.

The Court: Doesn't that go to the weight of it?

Mr. Sikes: All right, sir. Probably a tempest.

The Court: Very well. The motion is denied.

Q. (By Mr. Margolis): Will you proceed please, Doctor?

A. The complaints described by the patient at the time that I first saw him were chiefly the following: chest pain, which radiated upwards towards the left side of his neck, over to the left shoulder, down the left arm and to the wrist, brought on by exertion. Occasionally, the patient suffered this pain with rest, especially—excuse me, at rest, especially with nervous tension. His maximum walking ability at a slow pace was two blocks. And the pain was promptly relieved if at times only partially, by using this medication which I assume to be nitroglycerin. My future experience with [31] this patient, however, indicated that nitroglycerin did relieve the pain.

On examination, I found that he had some small rales——

Q. What are rales?

A. Rales are bubbly sounds like air bubbling through water—at the left base of his lungs; that his heart tones were distant and of poor quality. On fluoroscopic examination the heart was not enlarged and the lungs were relatively clear. And,

(Testimony of Murray Abowitz.)

also, I noted that he was a nervous, tense and apprehensive person.

Q. All right. Now, did you at that time or later take an electroencephalogram?

A. No. But I did take an electrocardiogram.

Q. Electrocardiogram. Excuse me. I have the wrong case. Electrocardiogram. Did you at that time, Doctor?

A. I did. And they showed some slight changes, which I can describe, indicative of heart damage.

Q. Do you have the electrocardiograms that you took?

A. I do. I have not only the electrocardiograms I took on that occasion, but all that I have taken subsequently over a period of two or three years.

Q. Will you hand me the first one in point of date, point of time? A. March 27, 1952.

Q. That's the electrocardiogram that you took on the [32] first occasion of Mr. Vitco visiting you, is that right? A. That is so.

Mr. Margolis: Do you wish to see it, counsel, before I offer it?

Mr. Sikes: No, not now.

Mr. Margolis: I would like to offer this as 3-A, and then we can mark the others B, C, D and so forth.

The Court: Very well. It will be received, and so marked.

(The document referred to was received in evidence and marked Libelant's Exhibit 3-A.)

(Testimony of Murray Abowitz.)

Mr. Margolis: Maybe we can go ahead with the rest of them. Just give me the dates.

The Witness: April 18, 1952.

Mr. Margolis: I offer it as 3-B.

The Court: Received in evidence.

(The document referred to was received in evidence and marked Libelant's Exhibit 3-B.)

The Witness: June 20, 1952.

Mr. Margolis: 3-C.

The Court: Received in evidence.

(The document referred to was received in evidence and marked Libelant's Exhibit 3-C.)

The Witness: August 7, 1952.

Mr. Margolis: That's 3-D. [33]

(The exhibit referred to was received in evidence and marked Libelant's Exhibit 3-D.)

The Witness: September 18, 1952.

Mr. Margolis: 3-E.

The Court: Received.

(The exhibit referred to was received in evidence and marked Libelant's Exhibit 3-E.)

The Witness: August 13, 1953.

Mr. Margolis: 3-F.

The Court: Received in evidence.

(The exhibit referred to was received in evidence and marked Libelant's Exhibit 3-F.)

The Witness: December 1, 1953.

Mr. Margolis: 3-G.

The Court: Received in evidence.

(The exhibit referred to was received in evidence and marked Libelant's Exhibit 3-G.)

(Testimony of Murray Abowitz.)

The Witness: October 12, 1954.

Mr. Margolis: 3-H.

The Court: Received in evidence.

(The exhibit referred to was received in evidence and marked Libelant's Exhibit 3-H.)

Mr. Sikes: I just want to get a couple of the dates here.

Mr. Margolis: I will wait a moment.

Mr. Sikes: Thank you. [34]

Q. (By Mr. Margolis): Now, Doctor, did you arrive at a diagnosis upon the basis of your first examination, which included the history and the electrocardiogram taken on that date?

A. I did.

Q. What was that diagnosis, Doctor?

A. That this patient was suffering from heart disease, a coronary artery disease, with insufficiency of the coronary arteries causing anginal pain. "Anginal pain" meaning heart pain. I also concluded that this had resulted from a myocardial infarction.

Q. What is that, Doctor?

A. Myocardium refers to the heart muscles. Infarction means the death of tissue. And in this case it means the death of certain isolated portions of the heart muscles. That the illness at the time that I saw him had begun early in January, or sometime during January, and the illness that he had suffered on board this fishing boat.

Q. Incidentally, Doctor, on an illness of this kind does it sometimes develop over a period of years and then manifest itself suddenly?

(Testimony of Murray Abowitz.)

A. No. An illness of this type does not develop over a period of years.

Q. Now, Doctor, I wonder if you could tell us the basis for your conclusion? In other words, can you relate [35] the findings and the history to the conclusion that you reached?

A. The most important basis for such a diagnosis is the history, which medically means a description of the symptoms, their occurrence, the sequence, relationship to external events. In this case his description of his sypmtoms, their occurrence, their relationship to exertion, their abeyance with rest, were classically and typically that of heart disease of the anginal type.

The electrocardiogram which was taken on the first occasion——

Am I confined in this answer to just the first occasion, the first visit?

Q. Well, Doctor, maybe I am not doing this well. Maybe it would be better——

You did arrive at this diagnosis on the basis of your first examination? A. I did.

Q. Let me withdraw that question temporarily and let me ask you whether or not you continued to see Mr. Vitco. A. I did.

Q. Can you tell me for how long a period of time and how regularly you saw him?

A. During the first year I saw him at intervals of several weeks; occasionally at intervals of one month. I [36] continued to see him at gradually increasing intervals until the fall of 1954.

(Testimony of Murray Abowitz.)

Q. When was the last time that you saw him?

A. The last time I saw Mr. Vitco in my office was October 12, 1954.

Q. Now, during those visits did you give treatment to Mr. Vitco?

A. I did. I treated him. I examined him frequently. Repeatedly took electrocardiograms and talked to him on numerous occasions.

Q. Now then, Doctor, did your subsequent examinations and your subsequent treatment confirm your original diagnosis?

A. It confirmed it and strengthened it.

Q. Now, Doctor, without confining yourself then to the first visit but covering the entire period of your treatment and of your observation of this man, will you give us the basis for the conclusion that you reached.

A. As I said, and without repeating——

Q. Yes, don't repeat.

A. ——the history, the description and the relationships, was one of the main bases for the diagnosis. The electrocardiogram on the first occasion, but even more so on subsequent occasions, confirmed that diagnosis and helped me reach that diagnosis.

Q. I wonder if you would take these E.K.G's., which [37] are in evidence as 3-A to 3-H, inclusive, and point out what there is in the E.K.G's. that tend to confirm your diagnosis? Incidentally, each time that you refer to an exhibit will you indicate which one it is that you are referring to?

(Testimony of Murray Abowitz.)

A. Exhibit 3-A.

Mr. Margolis: Now, your Honor—would you put it up there where your Honor can see it?

Mr. Sikes: May I come over?

The Court: Yes. Just hold it flat, or where you all can see it.

The Witness: In Lead 3 there is a depression of the S-T Segment.

Mr. Margolis: I wonder, would you want me to go into an explanation of what the S-T Segment is, your Honor?

The Court: If you care to.

Q. (By Mr. Margolis): Before we go into that it might be well for you to tell us what segments an electrocardiogram consists, and what they mean?

A. The complex of waves which make up one heart beat and we can take this as an example (indicating)——

The Court: Drawing a circle around Lead 2 on page 1, is it?

Mr. Margolis: Of 3-A.

The Court: Exhibit 3-A.

The Witness: A P-wave which represents the contraction [38] of the auricle.

Q. (By Mr. Margolis): Would you point what the P-wave is? That's the first wave? That's the first wave, the smallest of the waves there? It looks like an inverted V?

(Witness complies.)

The Witness: The R wave, which is this upright thin wave which represents the contraction of the

(Testimony of Murray Abowitz.)

ventricle and the T wave which represents the relaxation, let us say, of the heart beat.

On some other Leads there are some waves. For instance, in this Lead——

Q. (By Mr. Margolis): Pointing to Lead——

A. Lead V_3.

Q. ——V_3.

A. The wave—the downward wave that follows the R wave is called the S wave. If there is a downward wave preceding the R wave it is termed Q wave. Therefore, in this Lead, unfortunately, there is no, or a very small S wave.

The Court: Lead 2?

The Witness: In Lead 2. But the segment between the R and S waves and the T wave is known as the S-T Segment. That is this flat part that repeatedly shows up on all tracings.

Q. (By Mr. Margolis): Doctor, this is in effect a [39] reproduction of the manner in which the heart is functioning, and there are certain—there's a certain design that would be drawn if the heart were functioning normally, and variations from that indicate something wrong; is that right?

A. That is correct.

Q. Now, is there anything in this E.K.G., Exhibit 3-A, which indicated any such variations from the normal?

A. In Lead 3 of this tracing the S T Segment, this little segment here from this small S to this T, is depressed. In other words, it is below the base line. If this is taken as the base line, it is apparent

(Testimony of Murray Abowitz.)

that this little segment is below this base line; as it is here; as it is here; (indicating)——

Q. In other words, that's the straight line, between the S and the T wave, is depressed below the straight line between the other waves, is that correct? A. That is correct.

Q. What is normal, Doctor?

A. It should be on the same level.

Q. And does this depression repeat itself, Doctor? A. It does.

Q. Will you indicate how many times?

A. In all those four complexes up to here.

Q. Now, I notice that about halfway across that Lead 3 there is a line that has been drawn there. What does that [40] indicate?

A. It is at this point that the technician in taking the tracing asked the patient to take a deep breath and hold it; and then he proceeds with the tracing, which sometimes give us information of value.

Q. And in this case in which part of the E.K.G. do you find the information that helped you in your diagnosis, in the part before he took the deep breath, or afterwards? A. Before.

Q. I see.

A. Further in this tracing it is obvious that the T wave is not upright as it is here (indicating)——

The Court: Lead 2?

The Witness: ——as it is here in Lead 2. Nor is it downward as it is in some other Leads. But it is both up and down. The first part is down and

(Testimony of Murray Abowitz.)

the second part of the T wave in Lead 3 is up. It is therefore called a diphasic T wave. That also is indicative of heart disease.

And in this tracing 3-A, the other significant point is in Lead AVL.

Mr. Margolis: Let the record show that the doctor has circled that for convenience—AVL.

The Witness: That the S-T Segment, the same segment that we described in Lead 3 is elevated above the base line. Here is the base line (indicating). Here is the S-T Segment. [41] That is obviously above it. Here is the base line. Here is the S-T Segment. Here is the base line (indicating). That, too, is indicative of heart disease.

Q. (By Mr. Margolis): Now, Doctor, would you say that from that E.K.G. alone that a conclusive diagnosis of heart disease could be made?

A. No.

Q. What would you say that this shows?

A. It gives us ground to suspect the presence of heart disease.

Q. Now, Doctor, is there anything in the other E.K.G's. that is different from—well, first of all, let me leave it entirely to you. Will you go through the other E.K.G's. and indicate what else helped you in your diagnosis?

The Court: Do you wish the doctor to indicate the Lead and mark any illustrated markings thereon that he wishes?

Mr. Margolis: If you wish to do so, Doctor, will you do that; but indicate in each case if you make

(Testimony of Murray Abowitz.)

such a marking, indicate which exhibit you are referring to.

The Witness: The next tracings, that is 3-B and -C, were essentially the same.

Q. (By Mr. Margolis): As 3-A?

A. As 3-A. Coming to the tracing in August of '52, Exhibit 3-D, we find that the previously described diphasic [42] T-wave is now upright. The amount of S-T depression has lessened; although there are still some depressions, it is less.

Q. What is the significance of those changes, Doctor, in your opinion?

A. It confirms the significance of the changes originally demonstrated in the tracings and rules out the constantly present suspicion that minor changes are of no significance. Very frequently we see slight changes from the normal in an electrocardiogram, and it is only on the basis of so-called serial tracings that one can confirm or rule out the existence of disease. If those changes originally demonstrated in Exhibit 3-A remain constant, they would still be grounds for suspicion; but the fact that it changes, and as you will see later changes again and again, indicates a changing condition, indicating a disease condition rather than a normal variation—that is, a usual variation from the normal.

Q. In other words, Doctor, any one of us may have a slight variation from the normal, but that will remain consistent? A. That is true.

(Testimony of Murray Abowitz.)

Q. And where you see variations in the variation, that confirms heart disease?

A. That is true. [43]

In Exhibit 3-E, a tracing taken on September 18, 1952, the S-T Segment in Lead 3 which was previously depressed is now isoelectric.

Q. What does that mean?

A. Meaning it is on the same level with the base line.

Q. In other words, we found the situation where that segment was considerably below the base line, then came up a little higher, and now has come up level, is that right?

A. That is correct. And the T wave in the same Lead which was originally diphasic and then showed a tendency to come upward is now even more upright.

Q. Is there anything else in that exhibit, Doctor?

A. The T-wave in the AVL Lead is lower than on any previous tracing.

Q. Is that of any particular significance, Doctor?

A. That, I think, will come out in the further tracings, where this is merely a tendency. As you can see, these are only tendencies which only when they arrive at the thing which is done are of significance. Because in the next tracing, Exhibit 3-F——

Q. What date?

A. August 13, 1953, there is a significant change

(Testimony of Murray Abowitz.)

in the AVL Lead, that the T wave is now actually inverted and the S-T Segment in that Lead is elevated. In this same——

Q. Is that the same Segment that was previously [44] depressed, the S-T Segment?

A. No, sir, that was in a different lead that you are referring to. But that S-T Segment that you are referring to again shows the tendency to become slightly depressed after having returned to the base line.

Q. That's in Lead 3? A. Lead 3.

Q. I see.

A. And in Exhibit 3-G, the tracing of December 1, 1953, there is again the depression of the S-T Segment; and the T wave in AVL is upright, in other words normal, which would strengthen the suspicion that the previously described T wave in that Lead was of significance. But then that same T wave again becomes flat in a tracing of October 12, 1954, Exhibit 3-H, indicating a change in pattern, and indicating quite reliably the presence of heart disease.

Q. Then it is from the sum total of these E.K.G's. rather than from any single one that you draw your diagnosis, is that correct?

A. That is correct.

Q. And any single one by itself might not necessarily lead to that conclusion.

A. It would be very difficult to make a diagnosis on any single one.

Q. All right. Now, Doctor, what else, if any-

(Testimony of Murray Abowitz.)

thing, [45] led you to the conclusion that Mr. Vitco was suffering from this type of heart disease?

A. The course that he followed during the several years that I treated him. For instance, on various occasions he developed—on various occasions the rales which were heard at the left base of the lungs would disappear when given an injection of a diuretic.

Q. Could you explain the significance of that, Doctor?

A. Well, that would confirm the fact that these rales at the left base were due to heart weakness and that they cleared up with this injection.

Q. What is it that the injection does, Doctor?

A. The injection forces the kidneys to excrete more of the body fluid.

Q. And is it the heart weakness or inadequacy which lessens the flow of that fluid and therefore accounts for the rales? A. That is correct.

Q. All right. What else, if anything, Doctor?

A. The repeated and constant relief that he obtained from using nitroglycerin under his tongue. The relationship of the occurrence of pain to exertion. The——

Q. Well, let's stop for a moment on nitroglycerin. Is that typical of heart trouble, that nitroglycerin will give relief from pain? [46]

A. Not all heart trouble, but heart trouble of the anginal type classically and typically will be relieved by nitroglycerin. It is so typical that it is even to some extent a diagnostic point. At times

(Testimony of Murray Abowitz.)

when one isn't sure one is dealing with a heart disease, one can use a trial of nitroglycerin to confirm that fact.

Q. Go ahead. You started to talk about exertion, Doctor.

A. Well, the repeated relationship as described by the patient over a period of years of the pain occurring with exertion, or with aggravation, relieved with rest, confirmed in my mind the diagnosis; the localization and radiation of the pain upward under the sternum into the neck, on some occasions into the jaws, but then over toward the left into the shoulder and left arm—that is also very typical of heart disease.

On a few occasions he described blackout spells with exertion, fainting spells, which I attributed to the weakness of his heart and the inability of his heart to keep up with the demands that he would on occasion make.

Q. In other words, the fainting spells would be caused by a shortage of the blood supply, would it not, Doctor? A. That is correct.

Q. And that is caused by the ineffective functioning of the heart? [47] A. That is correct.

Q. You have completed your answer, Doctor?

A. Yes, sir.

Mr. Margolis: So your Honor will understand what I am doing, I intend to refer to certain portions of the telegrams which went from the boat.

The Court: They are in evidence?

Mr. Margolis: They are in evidence, your Honor.

(Testimony of Murray Abowitz.)

The Court: Libelant's Exhibit 2?

Mr. Margolis: Yes, your Honor.

The Court: May I see those?

(Whereupon the exhibits were handed to the court.)

The Court: What does nitroglycerin do? What effect does it have?

The Witness: It dilates the coronary arteries, thereby increasing the amount of blood that can reach the injured heart muscle.

The Court: Lessens the resistance to flow, is that correct?

The Witness: That is correct.

Q. (By Mr. Margolis): Is this the sort of heart disease that is caused by an occlusion or stoppage of the flow of blood?

A. A diminished supply of blood to the heart muscle.

Q. This opens up the area through which the blood can flow? [48]

A. That is right. And if there is an insufficient amount of blood reaching any part of the heart muscle that is immediately manifested as pain. That is nature's signal to the individual to stop or slow down whatever he is doing, if possible. Nitroglycerin dilates the arteries, and more blood gets through that heart muscle and the pain is relieved.

Q. Now, Doctor, I direct your attention to the fact that it was reported on January 3rd that about four days before that Mr. Vitco had noted a slight tickling at his throat.

(Testimony of Murray Abowitz.)

Mr. Margolis: That is spelled t-h-r-o-u-a-t, but I think we can take that for "throat," your Honor.

Q. (By Mr. Margolis): In your opinion, Doctor, would that sort of a symptom have any relationship to a heart condition?

A. A tickling in the throat?

Q. Yes. A. No, sir.

Q. Then it goes on and says, "And the last two days has developed into slight strangulation affect." Would the "slight strangulation affect" have any relationship to his heart condition?

A. The term "strangulating" is very typical, entirely typical of heart disease. [49]

Q. Now, in that connection, Doctor, there has been a diagnosis made of pharyngo—esophagitis, is that it?

Mr. Sikes: Your guess is as good as mine. I believe the first word is pharyngal, and the other is, however you pronounce it, esophagitis.

Q. (By Mr. Margolis): How do you pronounce it? A. Pharyngo-esophagitis.

Q. What is pharyngo-esophagitis?

A. Pharyngo-esophagitis is the inflammation of the pharynx and esophagus. The pharynx is the upper part of the gullet, the part one sees when one looks into another person's mouth, the back part of the mouth. What you are actually looking at is called the throat, as in a sore throat, is the pharynx. This extends downward for a few inches and its continuation is called the esophagus, which extends down into the stomach.

(Testimony of Murray Abowitz.)

Q. And that term merely means an inflammation of that area? A. That is correct.

Q. Now, would a tickling of the throat be a symptom of that sort of an incapacity or disease?

A. No, sir, I have never heard of that.

Q. Would a strangulation effect be in any way typical or have any relationship to this disease we are talking about. I am not talking about the heart disease, I am—— [50]

A. The pharyngo-esophagitis?

Q. Yes.

A. No, sir. I don't think that inflammation of the pharynx or the esophagitis could possibly be described as strangulating.

Q. Now, what are the typical symptoms of that?

A. Well, the typical symptoms of pharyngo-esophagitis would be pain with swallowing, burning pain, acidy type distress, a feeling of a lump in the gullet; and would be solely and entirely related to the process of swallowing. I doubt that there would be any symptoms at all if the patient were not swallowing.

Q. And would the kind of food from the standpoint of whether it was highly seasoned or sharp or alcoholic in content make any difference?

A. The answer is certainly it would. It would be like pouring acid on an open wound. Any spicy food or alcoholic beverages would be very painful. On the other hand, the patient would describe milk and bland foods or ice cream as being much easier to swallow, or not painful at all.

(Testimony of Murray Abowitz.)

Q. Now, there is also a report that Mr. Vitco at that time had a temperature. Is there any relationship between a temperature and the kind of a heart attack in your opinion Mr. Vitco had?

A. Yes, very classically and typically there [51] is a fever during the first several days or first week of the onset of such an attack.

Q. And does that fever remain constant or go up and down?

A. It goes up and down during the first week or so.

Q. Incidentally, there is also a statement that the strangulation effect seemed slight. When there is a heart attack of this kind does the severity of the condition vary from time to time?

A. Certainly it can, and does, usually.

Q. Now, there is also an indication that later on the strangulation effect became worse. Would this process of it getting better and then getting worse also be typical of a heart disease?

A. That is true.

Q. Would it have anything to do with this inflammation of the gullet of the throat?

A. The strangulating effect?

Q. Yes.

A. I can't imagine that it does.

Mr. Margolis: Now, I am referring to the third telegram, your Honor.

Q. (By Mr. Margolis): Doctor, ordinarily the pulse rate and respiration goes up during a heart attack, does it? A. That's correct. [52]

(Testimony of Murray Abowitz.)

Q. Now, there is a report, "Patient now sleeping" and "pulse rate 69" and "respiratory rate 18 breaths." That's approximately normal?

A. That's correct.

Q. After a heart attack and when a patient is sleeping, does the increase of pulse rate subside and the respiratory rate subside?

A. Regardless of what the rate of the heart and breathing is, it will always slow down during sleeping.

Q. So that——

A. I won't necessarily say that it would always slow down to normal, but regardless of where it is when the patient is awake and suffering from symptoms of pain, it will always slow down with sleeping.

Q. Now, it says here "Breath short since and during attacks but now that patient is in bed and has been given penicillin breath seems free when not during attacks."

Will you tell us what, if any, this relationship, this sort of a symptom has either to the gullet condition, which I will call it for short, or the heart condition?

A. I cannot at all conceive that there would be shortness of breath related to any inflammation of the gullet. But shortness of breath of course is a typical symptom that accompanies heart pain. And, typically, the heart pain lasts for a certain period of time, during which the patient [53] is very

(Testimony of Murray Abowitz.)

breathless, and then subsides, when the pain subsides the rapid breathing subsides.

Q. The breathing becomes free, is that correct?

A. That's correct.

Q. And then if there is another attack there is a repetition of shortness of breath, is that correct?

A. That's right.

Q. Now, here it says that the face is pale. Would that have any relationship to any of the two conditions we are talking about?

A. It certainly would not be related to any disease process of the gullet. But it certainly would be typically related to a heart disease such as we have discussed.

Mr. Margolis: Now, I am referring to the next to the last of these radiograms, your Honor. The reason that it is every other one is that the ones in between are the reply messages.

Q. (By Mr. Margolis): Now, the report is, "No swelling in ankles." Is that indicative one way or the other with respect to either of these two conditions?

A. Swelling of the ankles does not occur with this type of heart disease, in the acute phase.

Q. And it wouldn't occur for the pharyngal condition, either, would it, Doctor?

A. No, it would not. [54]

Q. Now, "Position of ailment is from Adam's apple to shoulder blade in windpipe." It is a little confusing. I don't know of any shoulder blade in

(Testimony of Murray Abowitz.)

the windpipe. But apparently it had something to do with shoulder blade.

Anyway, what is that typical of, Doctor? Pain which runs over to the shoulder blade?

A. As I stated previously, it's classically typical of the radiation of anginal pain.

Q. Would it have anything to do with the other type of a condition, Doctor? A. No, sir.

Q. Then there is again "Difficulty in breathing with a feeling of strangulation." You have told us about that.

Then it says here, "Had cold chills with perspiration."

Would that be related to either or both of these conditions?

A. That could be a symptom of both conditions.

Q. Now, it says here, "After penicillin injection pains and strangulation eliminated leaving only a feeling that something lodged in windpipe X is awfully hard for him to swallow."

Can you explain what relationship these symptoms, if any, would have to either of the two conditions we are talking about?

A. It's very difficult for me to conceive that an injection [55] of penicillin would relieve heart pain, except that perhaps as a result of the situation created. I can imagine, well, that a man suffering great pain is given an injection by the Captain or a physician and assured, reassured, told to lie down and rest and that this will help him, that that mere reassurance and rest and relaxation would of course

(Testimony of Murray Abowitz.)

cause a diminishment of the heart pain. The penicillin itself could not.

If the condition that the patient suffered from was a pharyngo-esophagitis and he was given a shot of penicillin, the penicillin might relieve the pharyngitis. It certainly would not have any effect whatsoever on the esophagitis. Any relief, however, obtained from penicillin in an infectious and inflammatory process would require several to many hours before any effect of relief were obtained.

Q. In other words, Doctor, would it be fair to say that if immediately following an injection of penicillin there was relief, the relief could not be attributed to the penicillin?

A. Except in a suggested sense. It frequently does.

Q. Now, there is a statement here that after the strangulation was eliminated it left a feeling that something was lodged in the windpipe and that it was awfully hard for him to swallow.

What relationship would that have to either of the two [56] ailments we are talking about?

A. That would not be a symptom of heart disease, but might be a symptom of pharyngo-esophagitis; or might be just a manifestation of general tension and apprehension of a nervous state. This sort of difficulty swallowing is extremely common in any condition of tension or nervousness, and I would think most people have at one time or another in a state of aggravation or a state of apprehension found difficulty swallowing and find that food will stick in their gullet if they are eating

(Testimony of Murray Abowitz.)

hurriedly during a period of tension. Very typically, such heart attacks and anginal pain are accompanied by a great sense of apprehension. As a matter of fact, it has been historically described as a fear of impending death, and patients who suffer from anginal pain will experience that apprehension even though they may experience such attacks thousands and thousands of times they always have that great fear of impending doom, as the actual classical expression. And it is not at all uncommon for patients to suffer various manifestations of nervous tension, which of course as you can see cannot be directly attributable to the pathological process in the heart, but as an indirect result thereof.

Q. Doctor, during the time that you were treating Mr. Vitco did he make any similar complaints to you with respect to difficulty of swallowing or pain in the gullet?

A. Yes, he did. On a few occasions he described difficulty [57] swallowing or the feeling of food or a lump in his throat or his gullet.

In my experience with him he always related this to a period of nervous tension and it was unrelated to food type. He was able to drink a little wine or whiskey without——

Q. Did you prescribe that he should take a little wine or whiskey on occasions, Doctor?

A. I frequently suggest that to patients with this type of heart disease, because alcohol is a very relaxing—has a very relaxing effect on people. In this case I don't recall whether I prescribed it. But I used the question of whether he could drink wine

(Testimony of Murray Abowitz.)

or whiskey as a test. If it were an esophagitis, inflammation of the esophagus or an ulcer, the response of the patient would always be that wine or whiskey caused an increased amount of pain and burning. If, on the other hand, it was due to the common manifestation of nervousness and tension then the response would be that wine or whiskey did not make it any worse, but on the other hand makes it feel better.

Q. So what was your conclusion with respect to this condition that he complained of of having difficulty swallowing in the gullet, and so forth?

A. That it was due to——

Mr. Sikes: If the court please, I believe that some foundation should be set as to when it was made. [58]

Mr. Margolis: Oh, yes.

Q. When were these complaints made, Doctor?

A. Particularly during the first six months of my care of this patient. He complained of occasional pain with swallowing. In May of 1952 I had performed an X-ray of the esophagus and the stomach because of these complaints, performed by an X-ray.

Q. You started examining him in March? You first saw him in March, and in May you had this done.

A. Yes. And because of these complaints I began to worry in my mind, perhaps there was some disorder of the esophagus or stomach that was either accompanying the heart disease or perhaps

(Testimony of Murray Abowitz.)

causing the symptoms, and the X-ray examination showed no inflammation or ulcer. It did, however, show some spasm of the esophagus.

Q. Tell us then what your conclusion was with respect to the cause of this condition and what relationship the finding of spasm had to that conclusion.

A. This confirmed the suspicion that I had that the pain he had with swallowing was related purely to nervous tension and was not caused by any pathological process in the upper digestive tract.

Q. Now, Doctor, can you tell us briefly what kind of treatment you gave Mr. Vitco from March 27, 1952—I think you said—until October 12, 1953?

A. The treatment consisted mainly of rest, the avoidance of exertion, to maintain his physical exertion below that point at which he had pain, nitroglycerin for the relief of pain and a variety of sedatives to combat this tension and apprehension; a reducing diet, which is always advisable in the treatment of any kind of a heart disease.

Q. Now, Doctor, did Mr. Vitco's condition improve under your care?

A. Very slowly and gradually it improved to a moderate degree.

Q. In your opinion does Mr. Vitco still suffer from a heart ailment? A. Yes, sir, he does.

Q. Is that a permanent condition?

A. It is.

Q. Now, at what point, in your opinion, did he achieve the maximum improvement that you could

(Testimony of Murray Abowitz.)

give him, and did his condition become permanent or more or less static?

A. I would estimate, roughly, that his condition stabilized and he achieved a maximum improvement in the late summer or early fall of 1954.

Q. Is it possible, Doctor, to set a date when this sort of thing happens, or is that just not possible?

A. It's very difficult. I would say approximately August of 1954. [60]

Q. And did it take a while after August 1954 for you to confirm the fact that about that time his condition had become static?

A. Yes. On two subsequent visits it seemed to me his condition had stabilized itself.

The Court: That is this past August?

The Witness: Yes, sir, 1954.

Q. (By Mr. Margolis): And by the time of his last visit on October 12, 1954, had you concluded that his condition had stabilized?

A. Yes, sir.

Q. Now, did you at one point at my request call in a doctor as a consultant? A. I did.

Q. And you consulted with him with respect to this condition, is that correct? A. Yes, sir.

Q. Who did you call in?

A. Dr. Joseph Hittelman.

Q. Is he a specialist?

A. In internal medicine and heart disease.

Q. And as a result of that consultation what was the effect had upon your conclusion?

(Testimony of Murray Abowitz.)

Mr. Sikes: I am going to object to that on the grounds that whatever this other doctor may have told him is, as far [61] this action is concerned, hearsay and I am deprived of the right to cross examine him. We don't know——

Mr. Margolis: Well, I will withdraw the question.

Mr. Sikes: Excuse me.

Mr. Margolis: I will withdraw the question. I may produce Dr. Hittelman. As a matter of fact, I have him ready to be here tomorrow morning.

I just have a couple more questions and then I am through with my direct examination.

Q. (By Mr. Margolis): Dr. Abowitz, was Mr. Vitco first sent to you by Mr. Robert Katz of my office? A. That's correct.

Q. And did Mr. Robert Katz ask you to send him copies of bills from time to time?

A. I think so.

Q. I show you a bill which is addressed to Robert Katz, Attorney, at 112 West Ninth Street, Los Angeles 15, for Mr. Anthiny Vitco, showing professional services, with the last date 10/12/54, totaling $348. Is that the bill for your services, Doctor? A. Yes, sir.

Q. Were the charges that you made for the service that you rendered the standard and reasonable charges for those services? A. I think so.

Mr. Margolis: I will offer the bill in evidence as Libelant's next in order.

The Court: Does that cover your charges only

(Testimony of Murray Abowitz.)

up to the point where the patient had achieved the maximum possible recovery?

The Witness: I think the statement will show there are two subsequent visits.

Q. (By Mr. Margolis): Were those visits, Doctor, visits which were necessary for you to reach a conclusion that he had previously reached the maximum state of recovery? A. I think so.

The Court: Well, the document is received in evidence as Libelant's Exhibit——

The Clerk: No. 4, your Honor.

The Court: ——No. 4.

(The exhibit referred to was received in evidence and marked Libelant's Exhibit No. 4.)

Mr. Margolis: That completes the direct examination, your Honor.

Mr. Sikes: I assume, your Honor, that you would at this time ordinarily have your mid-afternoon recess. So that is why I wonder if I may inquire of the doctor to see all his records. I could be looking them over at this time.

Mr. Margolis: They are available here.

Mr. Sikes: I would like to look them over before the [63] cross examination.

The Court: Very well. Perhaps you gentlemen can do that during the recess.

Mr. Sikes: Yes.

The Court: We will recess for 10 minutes.

(Short recess taken.)

(Testimony of Murray Abowitz.)

Cross Examination

Q. (By Mr. Sikes): Dr. Abowitz, so that we may set a little foundation here, you have described Mr. Vitco's heart condition generally. Is it your opinion that he had a coronary thrombosis on the vessel? I would like to know that first.

A. Well, when you talk of coronary thrombosis you are talking of the cause of the condition. Whereas, when you talk of myocardial infarction you are talking of the actual damage that occurs to the heart. There are various ways in which a myocardial infarction can occur. One of these is coronary thrombosis.

Q. In other words, that, as I understand it, is where the artery, the accumulation of calcium in there makes the artery smaller which leads to, you might call it, a coronary sclerosis, and eventually part of that breaks off and then it becomes a thrombosis.

A. Well, a thrombosis actually implies a clotting of blood within an artery. And when you discuss the calcification, [64] I think you are talking more in terms of a narrowing of the artery which can lead to a thrombosis. The significant point is, however, whether occlusion takes place or not. It can take place through thrombosis or through other means. Or whether narrowing is present.

Q. Well, what is your opinion as to actually what happened to his heart on the vessel?

A. I had no definite opinion on that because I

(Testimony of Murray Abowitz.)

don't think it can be established without an actual examination of the vessels themselves.

Q. You mean the heart vessels?

A. The heart vessels.

Q. These nitrites and nitroglycerin, those are not a curative in any way, but simply a pain reliever, aren't they?

A. Well, it's neither a cure nor a pain reliever. Actually it relieves the pain by virtue of dilating the artery.

Q. That is what I had in mind, was that it opened so that the blood could go through, is that correct?

A. That's correct. But a pain reliever is a drug which kills pain, like codeine or morphine.

Q. Well, I had simply in mind opening it up.

A. In that sense it relieves the pain.

Q. Now, I believe you said that you based part of your opinion as to this heart trouble on the fact that when you [65] began to see Mr. Vitco he occasionally suffered from dizziness, or told you he had been suffering from dizzy spells, is that right, sir?

A. He did tell me he had had dizzy spells, but I hadn't based my diagnosis of heart disease on that.

Q. By the way, did he ever tell you he had had these dizzy spells before he was ever on the vessel?

A. Yes, he told me he had had it on and off for 10 years, if I recall correctly.

Q. Now, is the function of penicillin to combat infection? A. Yes, sir.

(Testimony of Murray Abowitz.)

Q. And this type of—we call it inflammation of the gullet—would you call that an infection?

A. Not usually.

Q. Would you say that penicillin would have any effect on this inflammation of the gullet?

A. Not on the inflammation of the gullet, but it might on an inflammation or infection of the pharynx, which is the upper part, and which is commonly described as a sore throat.

Q. I am going to be forced into saying it, then. Pharyngo-esophagitis, is that it?

A. That is correct.

Q. That then would be affected favorably under most conditions by injections of penicillin, is that right? [66]

A. Only if it were caused by an infection. But the commonest cause by far of esophagitis is reflux flow of acid from the stomach up into the esophagus, which then irritates the membranes because the membranes of the esophagus do not tolerate the acid as the stomach does.

Q. Well, assuming that a patient did have this pharyngo-esophagitis and he was given penicillin on January the 3rd, would the penicillin have any effect by January the 5th or the 6th on any infection that was present in him? A. It would.

Q. I note from these Coast Guard messages, Exhibit 2, that on January the 5th, the message from the vessel reads:

"Two shots of penicillin 300,000 units each last shot 13 hours ago and temperature receded."

(Testimony of Murray Abowitz.)

Would you believe that it could have had an effect on Mr. Vitco for infection in a period of 13 hours?

A. If his fever was due to an infectious process, I think in about 13 hours penicillin would begin to relieve it.

Q. And I assume that a temperature is of course consistent with infection, isn't it?

A. Of course it is.

Q. Of course it is. And if his temperature dropped after having received the penicillin, would it be your opinion, Doctor, that it was probable that he was suffering from some type of infection? [67]

A. Not necessarily, because the temperature curve of most conditions, whether it is due to a heart attach or due to infection, have the classical picture of a rising and falling fever, rising in the afternoon and evening and dropping during the night and forenoon. With very rare exceptions this occurs with all fever curves. The classical exception is typhoid fever which is a high plateau maintained fever day and night.

Q. I understand that you state that the strangulation effect in the throat is, I believe you said, inconsistent with this pharyngo-esophagitis.

A. Yes, sir.

Q. Now, assuming the strangulation effects disappear, after having been given shots of penicillin for the two preceding days, do you believe that the strangulation effect, the sensation could have been caused from some infection? A. No, sir.

(Testimony of Murray Abowitz.)

Q. Penicillin, as I understand it, would have no effect one way or the other on a heart condition, is that right? A. That's correct.

Q. And it is your belief that after having had penicillin injected over a period of a couple of days that a patient with this strangulation effect, the strangulation effect disappears, would you still say that the strangulation could not have been due to some type of infection? [68]

A. That's correct, for this reason, if I may expand a bit: That there is not this simple relationship of cause and effect. The treatment and response of a patient is a very complicated matter. If a patient feels better on one day it is not reasonably logic to assume that what everyone did on a preceding day deserves credit for his improvement. Sometimes a patient improves despite whatever is done for him, and sometimes he improves just by virtue of bed rest and relaxation.

Q. For how long a period would the patient remain pale with regard to this type of heart attack?

A. During the time that he was suffering from frequent attacks of pain and shortness of breath.

Q. Does the patient usually complain in this type of heart trouble of something lodged in his throat?

A. That is not a typical complaint of a heart attack.

Q. Is it a typical complaint of a heart attack that he is unable, or it is very difficult for him to swallow?

(Testimony of Murray Abowitz.)

A. That is a common misinterpretation on the part of the patient and family, to interpret a heart attack of this type as due to indigestion, and it is an actual frequent accompanying symptom to have difficulty swallowing.

The commonest interpretation, by the way, of the public is often eight out of nine times, when persons first experience a heart attack, is to confuse it with indigestion, [69] and eight out of nine or nine out of 10 times they will themselves diagnose it as acute indigestion until the correct diagnosis is established.

Q. I am not sure that I did get an answer there. A. I am sorry.

Q. What I was after was if the patient does in fact find himself unable to or have difficulty in swallowing, does that, is that usually one of the symptoms of this heart disease? A. No, sir.

Q. And you state that quite often a patient's—is it sort of an imagination of things they have, is that correct, which you meant, these symptoms, in the nature of possibly being even a hypochondriac, that they seem to feel things that aren't there? Is that what you meant?

A. No. I was referring to the mistake in diagnosis that the lay public most commonly makes when they experience the chest pain that accompanies a heart attack. It is their interpretation, not their imagination. Everybody of course when he has a pain attempts to interpret it and that is, of course, diagnosis.

(Testimony of Murray Abowitz.)

Q. That would also apply to strangulation, is that correct?

A. Yes, sir. I beg your pardon. Strangulation is not a diagnosis. Strangulation is a symptom which is experienced [70] by the patient and which is not open to misinterpretation. The patient—strangulation means that the patient is choking, he can't breathe. This is something there can be no mistake about. That is not a diagnostic term.

Q. That is, if a doctor states it is strangulation, I assume, but not a lay person himself. In other words, aren't the two in the same category, where a person says it is difficult for him to swallow and that he has a feeling of strangulation. Either or both of those may be correct or may be incorrect, isn't that true?

A. Well, neither are terms of diagnostic. Both are terms of descriptions of symptoms, which, of course, the doctor gets from the patient. It's a subjective sensation in both cases and the doctor gets it from the patient.

Q. And you would classify them generally as equal in the sense of symptoms, is that correct?

A. They are both symptoms, but I don't know what sense you mean they are equal.

Q. Well, I will continue on.

You stated, I believe, that you thought this heart trouble began in January 1952, is that correct?

A. That is so.

Q. And upon what did you base that? Outside of his history, I mean.

(Testimony of Murray Abowitz.)

A. Almost entirely on the basis of the history.

Q. This pharyngo-esophagitis could be, could it not, generally from the Adam's apple to the shoulder blade in the windpipe? That, incidentally, is the term used in the Coast Guard message. That could be the area of that, could it not?

A. Not the shoulder blade.

Q. Well, I meant in the windpipe, from the Adam's apple down to an equivalent height in the shoulder blade.

Say, this is subject to several interpretations.

A. Interpreted that way, that could be a symptom of esophagitis.

Q. If the pharyngo-esophagitis is caused by some infection and that is the principal cause of it and penicillin and chloromycetin are applied, that treatment will and can clear that situation up within a matter of a month or two months, can it not? A. Yes, sir.

Q. I was checking over your notes, Doctor, at the recess there, and it appeared to me that you did not see——

Mr. Sikes: I will give these to him, your Honor.

(Whereupon the documents were handed to the witness.)

Q. (By Mr. Sikes): ——it appears to me that you did not see the patient, Mr. Vitco, from October 27, 1953 until December 1, 1953. Is that correct, sir?

You can look at them if you wish. [72]

A. Would you repeat those dates, please?

(Testimony of Murray Abowitz.)

A. October 27th of 1953 until December 1st of 1953. A. That's correct.

Q. And then—incidentally, what did you prescribe for him on December 1, 1953, if anything?

A. Phenobarbital and peritrate, p-e-r-i-t-r-a-t-e.

Q. Now, drawing your attention to the next dates, did you see Mr. Vitco for a period of almost 10 months between December 1, 1953—oh, I beg your pardon.

You saw him on September 3, 1954, did you not?

A. September 3, 1954, I did.

Q. When had you last previously seen him?

A. December 1, 1953.

Q. Then there was a period of some 10 months in there which you didn't see him, is that correct?

A. That is correct.

Mr. Sikes: Your Honor, Mr. Margolis and I have discussed the United States Public Health electrocardiogram which I understand was taken in March 1952, and Mr. Margolis I believe has it, a photostatic copy of it.

Mr. Margolis: I can't find it. I have a photostatic copy, and when they brought the records, your Honor, they apparently did not bring it.

Mr. Sikes: Well, that is all right.

Q. (By Mr. Sikes): I will ask you this, Doctor: Do [73] you recall ever having seen, observed or examined an electrocardiogram of Mr. Vitco taken on March 7, 1952, at the United States Public Health Service? That was before you first saw

(Testimony of Murray Abowitz.)

him. I wonder if you ever recall that in your mind?

A. I do not recall.

Q. Did Mr. Vitco tell you that he had been suffering from some throat trouble when he went on the vessel, on the Pioneer on this trip?

A. I have a hazy recollection of a possibility that he had a cold or cough a few months before that during the period of preparation for going to sea, but I am not very clear on that.

Q. Doctor, in one of these messages in Exhibit 2, we have the following from the vessel to the Coast Guard: "Breath short since and during attacks X but now the patient is in bed and has been given penicillin X breath seems free."

If he had an infection in the pharyngo-esophagus, if he had had such an infection and had received penicillin for a day or two before, is it consistent with that disease that the penicillin might have relieved his shortness of breath?

A. The question is a difficult one to answer because in the first place an infection in the pharynx and esophagus [74] would not cause a shortness of breath.

Q. Would it cause a difficulty in breathing?

A. No.

Q. Isn't it possible that while taking the breath the patient could irritate the place where the inflammation or infection was, thus causing a tickling sensation?

A. Oh, a tickling sensation, yes; but not a shortness of breath.

(Testimony of Murray Abowitz.)

Q. Is this entirely consistent with a heart attack Doctor,——

Mr. Sikes: And I am reading, your Honor, from Exhibit 2.

Q. (By Mr. Sikes): ——"at the time of attack has serious pains in windpipe."

Is that entirely consistent with a heart attack?

A. It is if the pain is in the neck. And very commonly the pain of a heart attack begins below the breast bone and rises up into the neck and into the jaws and then down the arms. And if the pain was in that sense and subsequent the patient has on numerous times described that type of radiation, I would say that it is consistent with a heart attack that this patient had.

Mr. Margolis: May I inquire, counsel, which of the telegrams you were referring to?

Mr. Sikes: Surely. It is No. 385. Mine are numbered [75] apparently with the Coast Guard numbers, your Honor. It is dated the 6th of January. It is a long one.

May I point it out to you?

A. Yes, here it is.

(Whereupon the document was shown to counsel.)

Q. (By Mr. Sikes): But if the patient were referring to the area in his neck in which he takes in the air which goes down into his lung, the windpipe, would a pain, severe pain there be consistent with a heart attack? A. Yes, it could.

Q. And upon what do you base that?

(Testimony of Murray Abowitz.)

A. On the basis that I cannot fully accept the localization as described by the patient——

Q. Excuse me for interrupting, and I don't want to be discourteous, but I said assuming that the location of which the patient was talking when he talked about his windpipe was actually his windpipe, a pain there, severe pain, is not consistent with a heart attack, is it?

A. But it is not inconsistent because the pain can radiate up into the windpipe as well as into the jaws and teeth, for instance.

Mr. Sikes: I believe that is all, your Honor.

Mr. Margolis: I have just one or two questions, your Honor.

Mr. Sikes: May I say something first? [76]

(Whereupon there was a discussion between court and counsel.)

Redirect Examination

Q. (By Mr. Margolis): Doctor, there have been a number of questions asked you with respect to the symptoms which were set forth in the series of telegrams. You have those symptoms in mind?

A. Yes, sir.

Q. Now, are those symptoms consistent with—are some of those symptoms consistent with pharyngo-esophagitis?

A. Yes. It sounds to me like the patient may have had a sore throat.

Q. Are some of those symptoms symptoms which

(Testimony of Murray Abowitz.)

cannot be possibly explained by pharyngo-esophagitis? A. Yes, sir.

Q. Are some of those symptoms symptoms which can only be explained by a heart attack?

A. That's correct.

Q. Is it possible that the patient may have had both pharyngo-esophagitis and a heart attack?

A. Certainly.

Recross Examination

Q. (By Mr. Sikes): Doctor, which ones are absolutely inconsistent with pharyngo-esophagitis?

A. The outstanding inconsistent symptoms are the strangulation, shortness of breath, tremendous apprehension of feeling of impending death,——

Q. I am sorry. Those aren't in there.

A. Oh, what is in here.

Q. Yes. That was the question. Excuse me.

A. Excuse me. Then I will have to look over this.

Mr. Margolis: If I may suggest, just look over every other one because the ones in between are the replies.

Mr. Sikes: May I assist him, sir?

The Court: Yes.

The Witness: Why do you ask me which ones. Point them out.

Mr. Sikes: All right, I will read them to you then. This is from the boat:

"We have a man aboard who 4 days ago noted a slight tickling at his throat and the last two days

(Testimony of Murray Abowitz.)

has developed into slight strangulation affect."

Anything there that is entirely inconsistent with pharyngo-esophagitis?

The Witness: The strangling.

Q. (By Mr. Sikes): "He was given 1 capsule of chloromycetin every six hours for two days X on Jan. 3 his strangulation effect seemed slight and then picked up and he had temperature." [78]

Anything there that is absolutely inconsistent with pharyngo-esophagitis?

A. The strangulation effect.

Q. "Patient was given two shots of penicillin 300 units each shot 13 hours ago and temperature receded."

Anything there inconsistent, as I have said before?

A. Inconsistent with pharyngo-esophagitis?

Q. Yes. All my questions will be that.

A. No, that is not inconsistent.

Q "Strangulation effect is now slightly worse."

A. That is inconsistent with the pharyngo-esophagitis.

Q. "Heart ailment none known and patient now sleeping."

This is the same day. Is there anything there that is at all clinically significant with regard to the esophagitis? A. No.

Q. "Patient know to have had high blood pressure for last couple years."

Which was later corrected in a later message to low blood pressure.

(Testimony of Murray Abowitz.)

"Pulse rate 69 X respiratory rate 18 breaths per min."

Anything inconsistent there?

A. That is not consistent with anything except a sound [79] sleep and relaxation.

Q. That's all we are interested in.

"Breath short since and during attacks but now that patient is in bed and has been given penicillin breath seems free."

A. That is inconsistent with pharyngo-esophagitis.

Q. "Correction to previous message X the patient previously had low blood pressure instead of high X no swelling in ankles X no previous heart ailment X position of ailment is from Adam's apple to shoulder blade in windpipe."

The same question.

A. If the radiation was into the shoulder blade, as it is frequently used in that sense, in my experience that is inconsistent with the pharyngo-esophagitis.

Q. That, though, is a preface to your conclusion, that this must be actually referring to the shoulder blade?

A. That's correct. You would not use the shoulder blade which is in back to determine the level of something in front.

Q. This was done by a fisherman captain.

A. Well, a physician——

(Testimony of Murray Abowitz.)

Q. Well, none of these have been done by a physician.

A. Yes. But it is difficult for me to conceive of even a layman doing that. [80]

Q. "At time of attack had serious pains in windpipe with difficulty in breathing."

A. That is inconsistent with pharyngo-esophagitis.

Q. "With a feeling of strangulation."

A. Also inconsistent.

Mr. Sikes: That is all.

Mr. Margolis: That is all, your Honor.

The Court: You may step down.

The Witness: Thank you, your Honor.

The Court: The trial will be recessed until tomorrow morning at 9:30.

The court will adjourn.

(Whereupon a recess was taken until 9:30 o'clock a.m. of the following day, Thursday, February 24, 1955.) [81]

Thursday, February 24, 1955; 9:30 a.m.

The Court: Are there ex parte matters?

The Clerk: No ex parte matters, your Honor.

The Court: You may proceed with the case on trial.

Mr. Margolis: Thank you, your Honor. At this time I will call Dr. Hittelman to the stand.

The Court: Please swear the witness, Mr. Clerk.

DR. JOSEPH HITTELMAN

called as a witness by the libelant, having been first duly sworn, was examined and testified as follows:

The Clerk: Give me your full name.

The Witness: Joseph Hittelman, H-i-t-t-e-l-m-a-n, M.D.

Direct Examination

Q. (By Mr. Margolis): What is your address, Mr. Hittelman?

A. 6317 Wilshire Boulevard, Los Angeles.

Q. Dr. Hittelman, you are a physician and surgeon duly licensed to practice medicine in the State of California? A. I am, since 1936.

Q. Will you state briefly, Doctor, your educational background?

A. I received my premedical training here at UCLA and went to the University of California at Berkeley in San Francisco, receiving a degree, M.D., in 1936. I spent two years at Mount Sinai Hospital as interne and resident in medicine, and returned to Los Angeles in private practice of medicine until I entered the service. I was in the service [84] for three years.

Q. Were you in the service as an M.D., Doctor?

A. That's right. And upon my return I resumed practice, specializing in internal medicine. Subsequently, confining my practice almost exclusively to heart disease, following post-graduate work at the University of Southern California, full time, for the years 1951-52.

Q. Do I understand, Doctor, that in 1951 and

(Testimony of Dr. Joseph Hittelman.)

1952 you spent full time at the University of Southern California?

A. Post-graduate school of medicine in cardiology.

Q. And since then your work has been chiefly cardiology? A. Yes.

Q. Doctor, at the request of Dr. Abowitz and somebody from my office did you examine Mr. Anthony Vitco?

A. I did, on December 14, 1953.

Q. And you understood that that examination was in connection with litigation that was pending?

A. I did.

Q. Now, you examined him in connection with the possibility of a heart condition, is that right?

A. That is true.

Q. Now, as a result of your examination did you reach any conclusion as to whether or not at that time Mr. Vitco was suffering from a heart condition?

A. At the time I examined him I made a diagnosis of [85] angina pectoris, which is a heart condition, specifically.

Q. What does that mean?

A. That's the term for chest pain due to coronary insufficiency, or inadequacy of the circulation to the heart muscle itself.

Q. I see. All right, now, Doctor, I wonder if you would tell us upon what you based that diagnosis?

A. Well, we base a cardiological diagnosis on

(Testimony of Dr. Joseph Hittelman.)

several different features. We go into it intensively, depending upon the particular case in question. Of course, the complete history, physical examination, electrocardiogram, X-ray of the chest and certain other additional tests, such as circulation time, vital capacity and——

Q. Excuse me, Doctor. A. Yes.

Q. What I meant—I didn't make my question clear. What I meant is this: What was there with respect to these various elements of the examination, such as history, electrocardiogram and so forth, which led you to the conclusion in this particular case?

A. Well, we can go through the various features. The history itself of a man having chest pain which recurred to the arm, coming on with exertion, being relieved by the cessation of exertion is quite characteristic of angina pectoris. The physical examination in this case, as in any [86] angina pectoris, isn't particularly revealing, however, in that there is no enlargement of the heart, in this particular case; and possibly with the exception of the appearance of the heart under the fluoroscope with a minimal pulsation, which again is a rather tenuous thing to hold onto from the objective standpoint, physically there is nothing to be discerned, particularly.

As far as the electrocardiogram is concerned, there we have some specific changes, particularly when the series of electrocardiograms are looked over that the man had taken in the past. There are

(Testimony of Dr. Joseph Hittelman.)

changes that take place from time to time which are indicative of coronary insufficiency.

Q. Excuse me one moment. A. Yes.

Q. In connection with this examination did you have made available to you and did you consider in your examination the electrocardiograms which, according to the information you had received, had been taken by Dr. Murray Abowitz?

A. Yes, I had those available to me.

Q. I wonder if you will just take a look at the electrocardiograms which are in evidence as Libelant's Exhibits 3-A to 3-H and tell me whether those are the electrocardiograms that you took into consideration?

A. Yes, these are the tracings that I saw. That's right. [87]

Q. Now, I am sorry to have interrupted you. Did you in addition, Doctor, take electrocardiograms of your own? A. I did.

Q. Do you have them with you, Doctor?

A. I do.

Q. How many did you take?

A. This one is December 14, 1953. And then I had another one in a subsequent visit a year later, December 21, 1954.

Q. You examined Mr. Vitco twice?

A. I examined him exactly on the following dates: December 14, 1953; February 18, 1954; December 21, 1954; and I had him come in December 22, 1954.

Q. Doctor, are examinations over a period of

(Testimony of Dr. Joseph Hittelman.)

time with intervals of time elapsing helpful in diagnosing the condition of a heart condition?

A. Sometimes they are essential, not only helpful.

Mr. Margolis: At this time, if your Honor please, I would like to offer the electrocardiograms dated 14 December 1953 and December 21, 1954, taken by Dr. Hittelman as Libelant's next in order.

Mr. Sikes: I have no objection, of course, your Honor.

The Court: Received in evidence.

Mr. Sikes: Was it my impression that he had taken three?

Mr. Margolis: There were three visits and two electrocardiograms, [88] is that right, Doctor?

The Witness: I think four visits and two electrocardiograms.

The Court: Those will be Libelant's Exhibits 5-A and 5-B, Mr. Clerk?

The Clerk: 5-A and 5-B, your Honor, yes, sir.

(The exhibits referred to were received in evidence and marked Libelant's Exhibits 5-A and 5-B.)

Q. (By Mr. Margolis): Now, in addition, Doctor, before you go on with the electrocardiograms, did I turn over to you a photostatic copy of an electrocardiogram which I informed you, according to my information, had been taken at the United States Marine Hospital, or U.S. Public Health Service in San Pedro, California, on or about March 7, 1952?

(Testimony of Dr. Joseph Hittelman.)

A. I received a photostatic copy of an electrocardiogram. However, the identification page apparently is missing. I don't know the exact date.

Mr. Sikes: Well, I shall be glad to stipulate that there was in existence such an E.K.G. of March 7, 1952.

The Court: Taken by whom?

Mr. Sikes: Taken by the United States Public Health Service at San Pedro. And if I may glance at this a second——

Mr. Margolis: I make this statement to the court, that I personally went to the Public Health Service in San Pedro, saw the original of this and asked them to make me a photostatic [89] copy and received it subsequently.

The Witness: I might state that the electrocardiogram is so similar to the subsequent ones we have here in similar respects that it must be the same patient.

Mr. Sikes: I wonder if counsel is going to attempt to introduce this.

Mr. Margolis: Well, I would like to offer it because when the records were subpoenaed by counsel, I talked to counsel and he informed me he had subpoenaed the original records, and I assumed that they were going to produce the original E.K.G. And I think counsel did, too. But they didn't come forward with it. So under those circumstances I do want to offer it.

Mr. Sikes: Then I only have one objection. There is a diagnosis at the bottom of this particu-

(Testimony of Dr. Joseph Hittelman.)

ar exhibit which of course, under the applicable ules which I should be more than glad to cite, is ot admissible. The electrocardiogram itself is, and am perfectly willing for it to go in. But I do ot want the diagnosis to come into the record or ecessarily to the attention of your Honor.

Mr. Margolis: Well, may I suggest this, your Honor: We don't have a jury here, so we don't ave the problem of a jury taking into considera- ion matters they shouldn't. I differ in some re- pects from counsel. I wouldn't like to spend the ime arguing. May it be *omitted,* say, subject [90] o a motion to strike this portion, or even with your Honor reserving ruling as to which portions of it e will consider material.

The Court: As to whether or not the diagno- is——

Mr. Margolis: Will be considered by your Honor.

Mr. Sikes: I am going to object, your Honor, trenuously, and I would like to submit to the court hat the diagnosis has no point in coming before your Honor.

The Court: Well, I will sustain your objection as to the diagnosis and receive the document.

Mr. Sikes: Thank you, your Honor.

Mr. Margolis: May it be marked in evidence, your Honor?

The Court: In evidence as Libelant's Exhibit 6, s it, Mr. Clerk?

The Clerk: 6, your Honor, yes, sir.

(Testimony of Dr. Joseph Hittelman.)

(The exhibit referred to was marked Libelant's Exhibit 6 and received in evidence.)

The Court: Now, as to that ruling, Mr. Margolis, if you have any authority that the diagnosis appearing there is competent evidence, I will be glad to hear it.

Mr. Margolis: Ordinarily it is not, your Honor. I think there may be a difference where you have a diagnosis made in the course of the duties of the United States Public Health Service which has to make a diagnosis for the purpose of determining whether a man can go back to work or not, in [91] performing that as a public duty. I have no authorities on it. But there are no authorities the other way.

Mr. Sikes: Well, I do have authorities, your Honor, in a heart case, and in United States Public Health records, precisely on the point, if your Honor would care to hear it.

Mr. Margolis: May I have the authority, counsel?

Mr. Sikes: Certainly. The case is Glazier vs. Sprague Steamship Company, 103 Fed. Supp. 157; particularly the footnote at page 161. And the court there relies on New York Life Insurance Company vs. Taylor, cited 147 Fed. 2d, 297. That was a seaman. There was a heart disease difficulty. The United States Public Health records were sought to be introduced by the seaman, and the courts specifically held that the diagnoses thereon were not admissible.

(Testimony of Dr. Joseph Hittelman.)

Q. (By Mr. Margolis): Now, Doctor, I think at the time I interrupted you you were beginning to discuss the significance of the E.K.Gs. in the making of your diagnosis.

Now, considering together all of the E.K.Gs., including the ones you took, the ones Dr. Abowitz took and the one furnished you from the U.S. Public Health Service, will you indicate, generally, their significance and specifically anything that you think is of special importance?

A. Well, as I say, the chief characteristic here is the changing electrocardiogram. The changes chiefly take place in certain specific leads, and I believe that they are [92] significant in that they indicate coronary insufficiency. I might point out a couple. This cardiogram in question from the U.S. Public Health Service——

Q. That is the one dated March 7, 1952?

A. Yes, I presume that is the date.

Q. Incidentally, so that the record will be clear, there is no date that appears on there.

Mr. Margolis: I wonder if counsel would stipulate that it was taken on or about that date?

Mr. Sikes: I should be happy to, March 7, 1952.

The Court: Very well.

The Witness: Now, from March 7th to March 27th—I think that is the first one taken by Dr. Abowitz—there are a whole series of these, and I will try to keep them straight. There is some distinct change in the T-wave in Lead 3; the earlier electrocardiogram showing a sharp inversion of this

(Testimony of Dr. Joseph Hittelman.)
T-wave, and in the one approximately three weeks later there is considerably less inversion. There is also a change in the S-T Segment which is convex in the earlier tracing and is horizontal in the later one. That's the significant change there.

Now, as we go down the list of tracings, the chief things that happened are the changes in the unipolar lead AVL, wherein the T-wave from time to time will change from being upright to flat to inverted and that is the chief change [93] that takes place in these whole series of tracings. And it is the T-wave with which we are concerned particularly in coronary insufficiency.

Q. In other words, when you have a coronary insufficiency, it's the changes in the T wave that you expect to find in the E.K.G's., is that right?

A. That is correct. The cardiogram is essentially like a fingerprint. Unless something happens to the heart the cardiogram doesn't change. And a significant change in the cardiogram indicates something is occurring in the heart.

Q. I see. In other words, a healthy person whose heart is in good condition will have basically the same electrocardiogram during the period that his heart is healthy, is that correct?

A. That is true. Or else, certain simple changes which are easily discernible as being within normal limits, as to position of the heart with a deep breath and so forth.

Q. I see. Now, Doctor, on these E.K.G's., on all of them, the practice is, is it not, to take about

(Testimony of Dr. Joseph Hittelman.)

half of each lead normally and then the other second half with a deep breath, is that right?

A. No. Only in Lead 3, because Lead 3 is the Lead which picks up the changes in position of the heart with changes in a diaphragm.

Q. Doctor Abowitz yesterday went over each specific [94] E.K.G. which he had taken and indicated in each of those the deviations from the normal. Now, I wonder if you would take the two that you took and the one from the U.S. Public Health Service and indicate in each of them the deviations from the normal?

Mr. Sikes: May I approach the witness, your Honor?

The Court: You may.

The Witness: I think you took those two tracings of mine from me.

Mr. Margolis: Did I take those two tracings away? I am sorry. I did.

I find that maybe we had better have that marked separately, that little strip. Will you tell us what that is?

The Witness: Oh, this is the Lead AVL, the significant one.

Mr. Margolis: Excuse me. Is it part of this?

The Witness: Here's a date, 12-21-54.

Mr. Margolis: Oh, 12-21-54. I guess we don't have to make it marked separately.

The Witness: It should be stapled in here. There are a lot of extra leads and exercises and so forth which I did.

(Testimony of Dr. Joseph Hittelman.)

Now, the reason for this extra strip I took—this is an AVL Lead——

Q. (By Mr. Margolis): Now, when you are talking about the extra strip, you are talking about the one that when it [95] unfolds extends beyond the width of the folder?

A. That's right. This was to eliminate the feature I was just talking about, the changes in position of the heart as influencing the cardiogram. Now, this is an AVL Lead which I had taken here with normal respiration, with a deep inspiration and with expiration to see what changes would take place, whether the abnormalities in the AVL could be due to positional changes in the heart. But here in all phases of respiration it is the same. So the fact that in this AVL where the T-wave is flat it remains flat throughout. So we are not influenced here by physiological changes. This is an abnormality which remains so and is not due to the position of the heart itself giving us that. That is why this extra strip was done.

Q. All right. Now, will you tell us what the abnormalities are, and indicate in each case as you refer to these three the number of the exhibit and the date of the electrocardiogram.

A. All right. You want a comparison from the original tracing?

Q. Well, suppose you start with the one of March 7, 1952.

A. All right. That's March 7, 1952. And compare it to the one, the first one I took—this is

(Testimony of Dr. Joseph Hittelman.)

stapled in the wrong place. That should go there (indicating). That is a [96] later one. The first tracing I took was '53.

Now, in Lead 3 there is a decided difference between the early tracing and the one I have here in that the later tracing has an upright——

Q. Excuse me, Doctor. It will be difficult to follow that because you say "in Lead 3," and you don't say Lead 3 from where. Now, if you would indicate Lead 3 in Exhibit so and so as compared with Lead 3 in Exhibit so and so, we will be able to follow you. A. Oh, call them by exhibit?

Q. Exhibit and date, if you please.

Mr. Sikes: Those are the exhibit numbers.

The Witness: I see.

Mr. Sikes: As a matter of fact, if the court please, it is perfectly fine as far as I am concerned if he simply refers to them by exhibit number. He doesn't have to put in the date.

Mr. Margolis: Just so we have them identified.

Q. (By Mr. Margolis): This is Exhibit 6.

The Witness: Exhibit 6, which is the early electrocardiogram.

Q. (By Mr. Margolis): The U.S. Public Health Service.

A. The U.S. Public Health Service, yes. And the one I am referring to that I took is Exhibit 5-B.

Now, there is a decided difference between these two as [97] a year or two has gone by. In Exhibit 6, the early electrocardiogram, Lead 3 shows a convex S-T Segment with a sharply inverted T-wave.

(Testimony of Dr. Joseph Hittelman.)

Q. Will you show that to us, Doctor?

A. Convex T-wave and sharply—convex S-T Segment, sharply inverted T-wave. This is the Lead 3 which I took (indicating). These are decidedly different. This is a flat S-T Segment and an upright T-wave.

Now, this incidentally is not a respiratory change because here is the same Lead 3 in deep inspiration, which still shows the upright T-wave.

The AVL in Exhibit 6, the early electrocardiogram, shows a notch in the R-wave which is absent in the AVL which I took.

Q. The first one that you took?

A. The first one that I took, correct.

Now, I think the precardial leads are pretty much alike.

Now, in addition I may go into my tracing, which is Exhibit 5-B, which I took before and after exercise. Now, we do an exercise test to try to bring out abnormalities where there is a question of doubt. Mr. Vitco was exercised rather gingerly. This was not a full exercise tolerance test because I hesitate to do that. Catastrophies will happen and have happened. So after several sit-ups of about six or seven he began to get a little uncomfortable. We [98] stopped the test. And then started repeating the whole tracings over again. And these are all mounted here and parallel the leads before and after exercise.

Now, the significant one that has been changing all these times has been the AVL, and here, sure

(Testimony of Dr. Joseph Hittelman.)

nough, after exercise we see that this AVL Lead lattens out considerably, which would indicate cor-nary insufficiency. The classical test for coronary nsufficiency with exercise is to watch for changes particularly in the T-waves or deviations in the S-T Segment. And here there is a distinct drop in he T-wave as compared to it before exercise trac-ng.

Q. Doctor, if a person does not have a coronary nsufficiency and you take an E.K.G. before exer-ise and after exercise would you expect changes of his kind in the E.K.G.?

A. No. There are minimal changes, but they do not fall within the arbitrary limits for diagnosis of coronary insufficiency on the basis of the exercise est. There may be lesser changes, different types of changes.

Q. But not changes——

A. But not to this degree, I don't think.

Q. Now, Doctor, are you completed with 6-B?

A. That's 6-B. Yes. Well, no, no. Mine was 5-B.

Q. 5-B. Excuse me.

A. And this is 5-A, which is the last one, December 1954. [99]

Now, here we have an entirely different picture again of the T-wave. Here we have a decidedly flat T-wave throughout as compared to the previous one. I beg your pardon. I am talking now about AVL, which has been the significant one all the way

(Testimony of Dr. Joseph Hittelman.)

through. Where as previously we have had a T-wave——

Q. Previously is 5-B.

A. 5-B. Now, this lead——

Q. 5-A.

A. ——is absolutely flat, a year later. There are no T-waves discernible. And this, as I mentioned before, was also followed through with deep inspiration, expiration, normal respiration and shows the same thing, so it is not a positional affair, with a drop in the diaphragm, a change in the position of the heart.

There are other features about the electrocardiogram which are still rather controversial. I took them more for my own interest. These are tracings down along the back of the chest.

Q. You say they are controversial?

A. I have them here all mounted on the cardiogram, too, but they are still more or less experimental.

Q. In other words, there is no general agreement?

A. No agreement. We will enter a whole field of dispute if we go into that, I'm afraid. [100]

Q. I see. All right, Doctor. Now, in your history were you informed that nitroglycerin relieved pain when it occurred as far as Mr. Vitco was concerned?

A. Yes. The way it is phrased here, "Doesn't get complete relief from nitroglycerin; some, but not complete."

(Testimony of Dr. Joseph Hittelman.)

Q. Did you draw any conclusion from that fac-
or, Doctor?

A. Well, the use of nitroglycerin is often a test
n discerning whether certain symptoms referrable
o the chest are due to heart disease or not. And
eart disease, characteristically, is relieved by nitro-
lycerin to varying degrees, whereas many other
onditions are not at all. Often times when we are
n doubt we may give the patient a few nitrogly-
erin tablets and have them report what effect they
ave when they get the symptoms.

Q. Now, Doctor, did you reach any conclusion
s to the probable location within the heart of the
lamage condition?

Mr. Sikes: If the court please, may we have that
s to which of the times he saw Mr. Vitco?

Q. (By Mr. Margolis): Well, I mean as a re-
ult of your entire examination of him.

Mr. Margolis: I think the doctor indicated that
t takes several examinations to make a proper di-
agnosis.

Q. (By Mr. Margolis): Is that correct, Doctor,
t takes more than one? That you would be unwill-
ng to make a [101] diagnosis based on one exami-
ation?

A. Oh, not necessarily. Sometimes a diagnosis
s very obvious. We can do it the first time.

Q. In this case, however?

A. But in this case, no, I don't think so.

Q. I see. Well, I want your diagnosis based
pon all your examinations.

(Testimony of Dr. Joseph Hittelman.)

A. Well, that is one of the reasons I scouted the back of the chest trying to pick up an area which might indicate where he had a coronary thrombosis. And as I say, that is still a matter of dispute. There are certain areas in the heart which are essentially blind as far as the electrocardiogram is concerned from the standpoint of picking up uncontrovertible evidence of a mild cardial infarction, coronary occlusion; and particularly in an individual of this type of build, rather broad and somewhat heavy, the upper part of the heart at the base is an area which rarely lends itself to easy electrocardiographic changes. And autopsy figures, even many cases over large series like this where electrocardiographic changes have never been evident will show a large mass of infarction in that area of the heart.

So that is one of the difficulties we run into. The back wall of the heart is the one that gives us the trouble as far as getting distinct electrocardiographic changes.

Q. Did you take electrocardiograms of the back? That [102] is, in the controversial area?

A. That's right.

Q. Are they available here in the event——

A. They are mounted on the back of the tracings.

Q. Now, Doctor, I want to show you——

The Court: Are they part of the exhibits which are in evidence here, Doctor?

The Witness: They are attached here, yes.

(Testimony of Dr. Joseph Hittelman.)

The Court: As a part of Exhibits 5-A and 5-B?

The Witness: Yes, sir.

Q. (By Mr. Margolis): Are there signs on them by which it is possible to indicate that they are the kind of electrocardiograms that you have testified to?

A. Yes. To any cardiologist these brief little notes in my handwriting would indicate right away where these are.

Q. Now, Doctor, I am placing in front of you Libelant's Exhibit No. 2, and I am going to ask you certain questions about that. But first I want to ask you about your familiarity with the medical term "pharyngo-esophagitis." Are you familiar with that term, Doctor?

A. Well, the terms are self-explanatory. I can't say I have ever made that particular diagnosis, except possibly in the swallowing of some caustic or something of that sort.

Q. Well, is it a kind of diagnosis that is commonly made in the United States? [103]

A. No.

Q. Can you explain what it is and why it isn't used in the United States, Doctor?

A. Well, pharyngo-esophagitis, obviously from the term itself, refers to an inflammation or irritation of the pharynx, which is the back part of the oral cavity, and the esophagus, which is the food pipe extending down to the stomach. Conditions which affect both of those structures I can hardly even think of except an actual chemical type of

(Testimony of Dr. Joseph Hittelman.)

caustic, because disturbances in the esophagus, which we call esophagitis, are usually due to some peptic activity or peptic digestion which is regurgitated from the stomach through the orifice into the esophagus and affects the lower part of the esophagus. To think of——

Q. Would you expect to find esophagitis in the upper part of the chest?

A. No. The point I am trying to make, it would affect the lower part of the esophagus. To reach up to the pharynx and actually irritate the pharynx is a little difficult to accept, I think. The condition is classically one of the lower third of the esophagus if it is based upon any disturbance as far as digestion is concerned. If it were based upon an infectious process, say of a respiratory infection, well, there, we get a pharyngitis, a nasal pharyngitis, pharyngial tracheitis; it goes down the respiratory apparatus, not the [104] digestive apparatus. Infectious processes inherent to the throat and nose affect the respiratory membranes and not the digestive membranes. And that is why this whole concept is a little difficult to accept.

Q. Would it be pretty much like saying a "broken arm-leg"? It's two different things, is that right, Doctor? A. I think so.

Q. Rather than one single diagnosis.

A. Because the esophagitis is linked up with the lower end of the esophagus, not the upper end of the esophagus.

Q. I see. By the way, Doctor, when you say

(Testimony of Dr. Joseph Hittelman.)

the "lower end of the esophagus," would you indicate about where that would be?

A. Well, that would be just about the end of the breast bone, I think would be the way to describe it.

Q. Now, Doctor, will you please take a look at Libelant's Exhibit No. 2, the first page. I might explain to you what this is. When Mr. Vitco was on the boat on January 2, 1952, these are the radiograms that were sent in describing by laymen the condition as they understood it, or as they were told about it, in order to try to get advice as to what should be done.

Now, if you will look that they say, "We have a man aboard who 4 days ago noted a slight tickling at his throat * * * " [105]

Now, would a slight tickling at the throat have anything to do with or be in any way a symptom of either a heart condition or what has been called here pharyngo-esophagitis?

A. Well, a slight tickling in the throat here in Los Angeles is usually due to some heavy smog. I don't know what it would be due to out on the high seas; usually some external irritation from the atmosphere or else some infection in the throat.

Q. That wouldn't indicate a heart condition in any way, is that right?

A. It doesn't sound like it, no.

Q. And it might have indicated some infection in the throat? A. That is true.

Q. Now, "* * * * and the last two days has developed into slight strangulation effect."

(Testimony of Dr. Joseph Hittelman.)

Now, what would that indicate with respect to the two conditions we are talking about?

A. Well, here we are using a term that medically isn't used, and I suppose I have to interpret it. "Strangulation effect" would I suppose mean choking. And an ordinary individual who starts with a tickling in his throat doesn't then subsequently complain of choking. He complains of a sore throat. I mean, the symptom is so very obious I don't know why the word "strangulation" would be used. One would [106] expect to say, "He's got a sore throat." If there was an infectious process in the throat.

Q. However, would a layman perhaps describe the strangulation, a choking effect which might have something to do with a heart condition?

A. Yes. That is a common description of a form of angina, which is a form of choking sensation. Strangulation sensation is used with infection in the throat. Practically the only time we ever hear of it would be a big paratonsil or abscess where there is actual projection and encroachment in the volume of the throat so that a person does feel like he is strangling and has every reason to feel like it.

Q. Now, when that sort of a condition exists does it exist as a result of attacks or is it a continuous condition?

A. Oh, that's a continuous condition; a very frightening one.

Q. All right. "He was given 1 capsule of chloromycetin every 6 hours for 2 days X on Jan. 3 his

(Testimony of Dr. Joseph Hittelman.)

strangulation effect seemed slight and then picked up* * *"

We have already discussed strangulation effect and we won't have to go over that again.

"* * * And he had temperature X patient was given two shots of penicillin 300,000 units each last" —"shop" it says here.

"* * * 13 hours ago and temperature receded X strangulation [107] effect is now slightly worse."

Now, what conclusions with respect to these two conditions do you draw from that; particularly with respect to the penicillin?

A. Well, apparently there was some fever. This sounds like there could have been some infection. And with a drop in the temperature from the administration of penicillin one would expect a successful result. However, this is one of those stories where the treatment was excellent but the patient is worse because the temperature has receded; however, the symptoms of which he complains are worse. So I think—well, one conclusion that we could come to is that there is an error in diagnosis; or there may be two conditions. The strangulation or the choking is not improving. Nevertheless, the other process which is possibly responsible for the fever is improving and responding to penicillin.

Q. So the strangulation effect you would not attribute to any infection of any kind, is that right, which might be cured by penicillin?

A. That's right.

Q. Would that, in your opinion, be a verifica-

(Testimony of Dr. Joseph Hittelman.)

tion of the fact that the strangulation effect is due to some heart condition?

A. I think we could accept that.

Q. Now, if you will skip one telegram and turn to the [108] third one, Doctor. The one in between is just a reply.

Now it says,

"* * * Patient now sleeping X patient known to have had high blood pressure * * *" and that later turned out to be a mistake. He had low blood pressure.

"* * * for last couple years X pulse rate 69 X respiratory rate 18 breaths per min."

Now, on the patient sleeping, does that indicate anything with respect to either of these two conditions we are talking about?

A. Apparently he is—well, he is at rest and comfortable. The respiratory rate may be a trifle high for a man sound asleep. That's all.

Q. You wouldn't draw any great significance one way or the other from it, is that correct?

A. No.

Q. "Ankles not known will check immediately." And then this, "breath short since and during attacks but now that patient is in bed and has been given penicillin breath seems free when not during attacks."

What significance if any do you attach to that?

A. Well, the repeated mention of the word "attacks" would indicate that this is not a process such as an infection of pharyngitis or the term "pharyn-

(Testimony of Dr. Joseph Hittelman.)

go-esophagitis," which [109] should not come in attacks, even if that condition were to exist. That would be a constant discomfort. Perhaps it might be alleviated by the taking of food or some bland material to relieve the irritated mucus membranes. But when a person gets the disturbance described here in attacks one would tend to say that was caused not by a diagnosis of pharyngo-esophagitis at all.

Q. Would it point in any way to a heart condition?

A. Well, with the so-called strangulation one would be much more willing, or should be much more willing to accept that diagnosis than the other, I think.

Q. Now, it says, "face is pale." How does that fit in with either of these?

A. I don't think that is of any significance. The patient is asleep at this time?

Q. Yes. All right. Now, let's see. Now, if you will turn over again to the next one.

"The patient previously had low blood pressure instead of high."

Would that be of any significance, Doctor?

Do you find the one that I am talking about?

A. Did you skip—oh, you skipped one.

Q. You skip one because the ones in between are the ones that come the other way.

A. Well, these questions about blood pressure back and [110] forth are apparently the attempt by the physician, I suppose, to find out whether

(Testimony of Dr. Joseph Hittelman.)

the patient had any previous history of heart disease. Having had high blood pressure for some period of time would give him a lead as to the possibility of the existence of some hypertensive heart disease, for example. But if he had low blood pressure then that would throw that diagnosis out.

Q. As a pre-existing condition prior to this attack.

A. Well, it would eliminate the possibility of high blood pressure if he had low blood pressure. But the term "low blood pressure" is very loosely used, and we look askance at it quite a bit.

Q. "No swelling in ankles."

Is that of any significance?

A. That is significant in that it further corroborates this patient did not have heart disease, at least to the degree where he would have congestive heart failure, which would cause the retention of fluid in the body.

Q. "No previous heart ailment X position of ailment is from Adam's apple to shoulder blade in windpipe." Now, have you ever heard that phrase, "* * * from Adam's apple to shoulder blade in windpipe"?

A. Well, there are a lot of variations in angina. We are thinking about heart disease here, and all the way from the classical picture to pain in the angle of the jaw [111] alone, and this description could well fall within the coronary artery disease of angina pectoris.

Q. Would you expect that sort of a pain in con-

(Testimony of Dr. Joseph Hittelman.)

nection with the other ailment that we are talking about, the pharyngo-esophagitis?

A. Well, I think that would be a constant burning type of pain.

Q. And in what area would that be? Would that be in the windpipe?

A. Well, this whole area from the neck down, the throat and neck down could be, yes. They are all so intimately associated.

Q. "* * * with difficulty in breathing with a feeling of strangulation."

What would that point to, Doctor?

A. Well, pain, choking, difficulty in breathing coming in attacks, that begins to look very definitely like a heart——

Mr. Sikes: May I interrupt the court for just one moment. I believe that is one entire sentence and Mr. Margolis should read the entire sentence.

Mr. Margolis: I will read that. I think counsel is right, your Honor. Let's take the whole sentence.

"At time of attack had serious pains in windpipe with difficulty in breathing with a feeling of strangulation." I have read the whole thing, now. [112]

Mr. Sikes: All right.

Q. (By Mr. Margolis): Now, what conclusion do you draw from that entire sentence?

A. Well, I think my previous answer—as a matter of fact, I think I put that whole sentence together because this, as you say, coming on an attack, pain, difficulty in breathing, feeling of strangulation all can very adequately refer to an attack

(Testimony of Dr. Joseph Hittelman.)
of angina pectoris, or pain due to coronary artery disease.

Q. "After penicillin injection pains and strangulation eliminated leaving only a feeling that something lodged in windpipe X is awful hard for him to swallow." What would you refer that to, if anything, Doctor?

A. Well, there's a feature here of "after penicillin injection." Now, I don't know how long after, or what to assume. Penicillin injections presumably can do only one of two things: It can alleviate an infection after the penicillin has had time to work, or you can have the psychological effect of being stabbed by a needle and feeling that one is going to get relief; the reassurance of being administered medical attention, it may psychologically be so alleviated as to have the symptoms subside. And that, of course, is not at all unusual. In this particular case, because of no description of the actual time interval, I don't know. The way it is written here, "after penicillin injection pains [113] and strangulation eliminated * * *" I suppose that must be just the psychological effect or that the attack subsided by itself, because that couldn't have affected the infection that rapidly.

Mr. Sikes: If the court please, I might like to draw it to the court's attention, and possibly to the doctor and Mr. Margolis, the first message, a day or two previously in which they had testified they had given him penicillin, and the doctor may not have noted that, that there was some time period.

(Testimony of Dr. Joseph Hittelman.)

Mr. Margolis: I don't think that it necessarily follows from that that they meant it took 13 hours for strangulation to stop.

Mr. Sikes: Well, we will go into it on cross.

Q. (By Mr. Margolis): He says, "No attack since 2 a.m. X color normal X has no fever X plus 79 X breathing normal."

Now, if there was a heart condition, Doctor, and there was an attack, once the attack had subsided would he return to normal breathing?

A. Yes.

Q. Would you expect these kind of variations with respect to a condition such as pharyngo-esophagitis?

A. Well, I certainly wouldn't—I wouldn't expect the clear-cut repeated reference to "attacks" with pharyngo-esophagitis, [114] frankly.

Q. Now, Doctor, when you take these telegrams and the diagnosis, considering them made there by —incidentally, these were not done by the doctor. This was done by the captain of the boat or by somebody on the boat who was a fisherman and not a doctor. However, when you consider the information that you get from here, together with the information you obtained on the rest of the history from Mr. Vitco, together with the electrocardiograms concerning which you testified, do you have an opinion as to whether or not Mr. Vitco suffered a heart attack on or about January 2, 1952, at the time that these radiograms referred to?

A. Well, in the light of this described acute

(Testimony of Dr. Joseph Hittelman.)
episode and subsequent history and my examination, I think there is every reason to believe that at that particular time on shipboard Mr. Viteo did suffer a coronary occlusion.

Mr. Margolis: You may cross examine.

Cross Examination

Q. (By Mr. Sikes): Doctor, as I understand it, penicillin of course will not, at least physiologically, aid or assist in the treatment of a heart condition, will it?

A. Not if it's unassociated with infection, it wouldn't.

Q. Now, psychologically, I believe you mentioned that it might have some result insofar as the symptoms or effect [115] on the patient is concerned, is that right? A. That is true.

Q. Now, these strangulations that one has in an acute coronary attack, this feeling of strangulation, I believe you said it was—or the other doctor said it was accompanied even by a feeling of impending death. A. That is true.

Q. Those are real symptoms and feelings of the patient, are they not, this acute strangulation?

A. That is true. The patient describes them as such.

Q. Yes. Is it really your opinion that such an attack and such a feeling of strangulation can be completely alleviated psychologically by simply giving the patient an injection of penicillin?

A. Oh, yes, yes. You have to be aware of the

(Testimony of Dr. Joseph Hittelman.)

concept of coronary artery spasm, individual with deficient coronary circulation, who was aroused to anger, for example, and suddenly the vessels clamp down and already deficient circulation is cut off and immediately you get that pain. And if the cause for the anger is dissipated, or whatever the excitement may be or the occasion may be, the pain may be instantaneously relieved—all types of influences of such nature. We are dealing with a physiological process wherein these blood vessels are always subject to changes in diameter of their caliber. [116]

Q. Is there any difficulty in swallowing accompanying one of these heart attacks?

A. Well, during the choking sensations there is. When that is relieved there isn't.

Q. Well now, is that, too, a psychological reaction, or is there really difficulty in swallowing, physiologically speaking?

A. Well, the pain of angina pectoris apparently is a type of pain that is not easily borne when it is severe. Although, I have never seen myself—many patients when they get that pain they can no more think of swallowing than they can of doing anything else. They are just urgently waiting for the pain to leave them.

Q. As a matter of fact, Doctor, angina pectoris is really a symptom, isn't it?

A. That is true, yes. However, I don't think the American physician uses the term "angina pectoris" for anything except the symptom being due to heart

(Testimony of Dr. Joseph Hittelman.)
disease. The older terminology, it just means pain in the chest.

Q. I assume from the pectoral muscles.

A. That's right.

Q. Now, the feeling of something lodged in one's throat, would that be consistent with an infection of the throat?

A. I don't think there is ever that much confusion with an infection of the throat, because everybody at sometime [117] or other has had a sore throat and they describe it as a sore throat. They don't describe it as a lump in the throat or choking or a lot of other things; unless there is an actual encroachment on the volume of their throat by an abscess of tremendously swollen tonsils, or something like that.

Q. Let us assume that the patient no longer feels any strangulation effect at all, but nevertheless feels something lodged in his throat. Is it your opinion that that then is due to some cardiac difficulty?

A. No, that's not commonly described. That is true.

Q. I assume then a feeling of it being difficult to swallow, that is consistent, I assume, with an inflammation or infection of the throat, is that correct? A. Difficulty in swallowing?

Q. Yes. A pain on swallowing.

A. Yes.

Q. And isn't it true, Doctor, that if such a pain and such a throat condition were due to infection,

(Testimony of Dr. Joseph Hittelman.)

isn't it true that penicillin might very well alleviate that condition?

A. Yes, within a matter of hours.

Q. Yes. Assuming, then, Doctor, that Mr. Vitco had a tickling sensation in his throat, and in fact it was due to some infection in his throat and he was given two shots of penicillin, 300,000 units each on January 4th, do you believe that by January 6th that they might very well have [118] relieved the infection? A. I think so.

Q. Is the feeling of not being able to get enough air, is that consistent with this type of heart attack?

A. Very much so. During the time of the attack, yes.

Q. If the patient, before he ever had the attacks, had difficulty in not getting enough air, then would that affect your last answer?

Mr. Margolis: That is objected to on the grounds it assumes facts not in evidence.

Mr. Sikes: Well, the doctor is being called, if the court please, out of turn. I had intended to bring those out on cross examination of Mr. Vitco. I have been unable to do so.

Mr. Margolis: That isn't my point, your Honor. My point is, your Honor, that the assumption that the prior shortnesses of breath, if they existed, didn't have anything to do with the heart, I don't think can be established.

The Court: The question, as I understand it, is that the doctor is asked to assume that these shortages existed prior to the so-called attacks, and if

(Testimony of Dr. Joseph Hittelman.)
he so assumed, he was asked if he would alter his opinion. Is that the question?

Mr. Sikes: Yes, sir.

Mr. Margolis: Well, I would like to have it more specific as to whether this came in attacks—in other words, have the question be meaningful. [119]

The Court: Well, if the doctor understands it——

Mr. Sikes: Do you understand me, sir?

The Witness: If you repeat the question. I think I know what you have in mind.

Q. (By Mr. Sikes): All right. What I had in mind was, you had stated that one of the symptoms, as I understand, of this type of heart attack—we'll say in this particular case—was a shortness of breath, and if that were one of the symptoms with regard to Mr. Vitco, let us say, and you answered yes, that it is one of the symptoms. And then I asked you if the fact that he had shortness of breath before these attacks would that then affect your answer to the first question?

A. Well, we would have to know the exact circumstances. I can differentiate for you, if you wish.

Now, oftentimes, together with a pain of the choking, there is a shortness of breath during an attack. There are also some people who get angina without pain, peculiar as that may be, who may be lying in bed, particularly at night, and will wake up with shortness of breath. And we feel that that may be angina, and often is.

Then there are other people, a vast host of people that we have to distinguish from when we are deal-

(Testimony of Dr. Joseph Hittelman.)

ing with this problem, those who just have what we call "air hunger," who at rest will tell us they are getting short of breath and [120] can't catch a deep breath, and so forth. That is a straight anxiety type of symptom. But shortness of breath that comes on with effort and breast pain certainly is related to angina. And I would say that shortness of breath under the other quiet circumstances may well be psychological disturbances.

Q. I believe you stated from your physical examination of Mr. Vitco's heart that—I believe your words were, "There was nothing particular to be discerned there." Is that correct, sir?

A. That's right.

Q. Then I believe you went ahead to state that your conclusion in the case generally was based, I believe,, principally on the series of EKG's. Is that correct, sir?

A. The history and the electrocardiograms together are the chief ones, yes.

Q. Let's assume, Doctor, that you had received no history at all from Mr. Vitco and examined those electrocardiograms, which are of course a form of objective findings. Would your conclusion have been any different than what you have stated on direct examination?

A. I wouldn't make a diagnosis on electrocardiogram alone, not only in this case but in many, many other clear-cut cases, actually. I don't think —when we resort to laboratory evidence alone we

(Testimony of Dr. Joseph Hittelman.)

are on very shaky ground. As a general rule, I wouldn't do it. [121]

Mr. Sikes: Mr. Clerk, may I see Exhibit 3-G?

(Whereupon the document was handed to counsel.)

Mr. Sikes: May I approach the witness, sir?

The Court: You may.

Q. (By Mr. Sikes): Now, Doctor, will you look at 3-G. I mean, the tracing. A. Yes.

Q. And will you also look at Exhibit 6, which is the electrocardiogram taken at the United States Public Health Service. A. Yes.

Q. Now, you have told us that generally the main significant clinical finding was, as I believe, on the AVL Lead, is that correct?

A. No, the Lead 3 here is distinctly different. Now, the AVL—no. Chiefly Lead 3. Both of them do have differences.

Q. Now, will you tell us what in your opinion are the differences, if any, between those two particular electrocardiograms which you have in your hand, which are Exhibits 6 and 3-G?

A. The differences?

Q. Yes. Are there any significant differences?

A. Yes. In Exhibit 3-G, in Lead 3, we have a depressed S-T Segment and an upright T wave.

In Exhibit 6 there is a convex S-T Segment and a sharply inverted T-wave in Lead 3.

Q. Would it be significant to you, those findings, that his condition had changed between the dates of those two?

(Testimony of Dr. Joseph Hittelman.)

A. I think it is quite suggestive, yes. In Lead AVL there is also a difference in the configuration. In Exhibit 3-G, in Lead AVL there is a slightly elevated S-T Segment, with a low T-wave.

In Exhibit 6, in the same Lead AVL there is a notched R-wave and a quite ample T-wave.

Q. And those findings in Exhibit 6 are not present in 3-G, is that correct?

A. That's right, yes.

Q. Now, Doctor, will you take 3-G and 3-H, those two, and will you tell me what, if any, difference or distinction there is between those two exhibits?

A. Well, here the difference is in the AVL Lead. In 3-G we have a slightly elevated S-T Segment and a low T-Wave.

In 3-H we have an absolutely flat T-Wave. That's the essential difference there.

Mr. Sikes: Thank you, Doctor.

Just one moment. I believe that is all, Doctor. Thank you. [123]

Redirect Examination

Q. (By Mr. Margolis): Now, Doctor, infection is usually associated with temperature, is it not?

A. That is true.

Q. If the temperature goes down it is an indication that the infection is cured, correct? Or is improved? A. Improved, yes.

Q. So that if infection caused choking, Doctor, and the infection was improved, you would expect

(Testimony of Dr. Joseph Hittelman.)

the choking to get better and not worse, if that correct? A. That's right.

Q. And if the temperature goes down and the choking gets worse, then you wouldn't attribute the choking to any infection, is that right?

A. That's right.

Q. Now, Doctor, we have here a heart condition —I think you told Mr. Sikes on cross examination that you would never make a diagnosis based upon EKG's alone; that you always required history.

A. Well, it's a bad policy.

Q. Do you know of any place where it is accepted medical practice to make a diagnosis on EKG's alone?

A. Well, an electrocardiographer is asked to make a diagnosis and may have a quite abnormal electrocardiogram, [124] and if he doesn't know the history he makes mistakes. And that is why we see the mistakes in top-notch electrocardiographers who interpret electrocardiograms just from the standpoint of what they see before them, and the autopsy table will show them incorrect. Whereas, an ordinary general practitioner may be able to outshine him because he has seen the case and he knows what is going on.

Q. All right. Now, taking all the electrocardiograms together, with the changes that occur in the electrocardiograms and the history upon which you base your diagnosis, and considering the contents of the telegrams, Libelant's Exhibit 2, is it your

(Testimony of Dr. Joseph Hittelman.)

opinion that the heart condition originated on or about January 2, 1952, or some later date?

A. I think it originated at that particular time; the episode in question.

Q. On or about January 2nd?

A. That's correct.

Mr. Margolis: That is all.

Mr. Sikes: I may have one question, your Honor.

Recross Examination

Q. (By Mr. Sikes): In the absence of the history which was given to you by Mr. Vitco, you would be unable to set any time as to when this coronary attack occurred, is that correct?

A. That's correct. [125]

Mr. Sikes: That is all, sir.

The Court: You may step down, Doctor.

The Witness: Thank you.

(Witness excused.)

The Court: We will take the morning recess at this time.

(Short recess.)

Mr. Sikes: If the court please, there may be some misunderstanding and possibly some confusion on Exhibit 6, which was the electrocardiogram from the United States Public Health Service, together with a diagnosis thereon. I cannot remember if your Honor made a ruling on the diagnosis at the time I believe you admitted it into evidence.

The Court: I intended to exclude the diagnosis part of the document.

Mr. Sikes: I see. Thank you.

Mr. Margolis: I will ask Mr. Vitco to resume the stand, your Honor.

The Court: You may.

The objection to it, I assume, is hearsay.

Mr. Sikes: Yes, your Honor.

The Court: On the diagnosis.

Mr. Sikes: Oh, yes. [126]

ANTHONY VITCO

the plaintiff herein, called as a witness in his own behalf, having been previously sworn, resumed the stand and testified further as follows:

Direct Examination—(Continued)

By Mr. Margolis:

I am not absolutely positive, your Honor, just where I left off.

The Court: I think in your last question you were just getting to the occurrence at sea.

Mr. Margolis: That was my recollection. Though, there might be some slight repetition.

Q. (By Mr. Margolis): I believe, Mr. Vitco, that I was asking you about your becoming ill on January 2, 1952. A. That's right.

Q. About what time of the day did you become ill?

A. It was right after dinner, Mr. Margolis; must have been around from 6:00 to 7:00 in the evening.

Q. Now, will you tell us where you were at the time and what you were doing?

(Testimony of Anthony Vitco.)

A. I was just through with serving the dinner, and just through with the dinner.

Q. Now, were you still in the galley?

A. I was still in the galley.

Q. What had you done that day? [127]

A. What did I do that day?

Q. What work did you do that day?

A. Ordinary work every day; cooking and——

Q. You did your regular work?

A. That's right.

Q. That was the third meal you had made and served?

A. That's right. That was the third meal.

Q. Now, will you tell us what happened, and how you felt? Had you been all right during the day?

A. It happened all at once, Mr. Margolis. Just like——

Q. What happened?

A. I got a funny feeling, starting to get—like dizzy. And I didn't say nothing to the boys. I got ready with my dinner. Then they washed the dishes after we got through eating. The boys usually wash the dishes. Well, I just felt—all at once I felt funny. I went in, away from the galley, I went in my sleeping quarters and I laid down with my clothes on.

Q. You say you started feeling funny. Now, tell us how you felt.

A. Well, funny, the way it is hard to describe. Well, as soon as I laid down I lost my breathing.

(Testimony of Anthony Vitco.)

I felt a terrible pain in my chest, down to my——

The Court: What part of your chest?

The Witness: Right here, from the stomach up here [128] (Indicating).

The Court: The center part of your chest?

The Witness: And toward the left. Right here from my, oh, how would you say it—from my stomach, or from here down to here, and my left side, my arm (indicating). And, oh, I was scared I was going to die. Just like something was pressing across my chest. I tried to holler. I couldn't holler.

Q. (By Mr. Margolis): When was it that you tried to holler? Where were you at that time?

A. I was lying in bed with my clothes on. It happened in about two minutes, you know, after I laid down. I lost—about a minute after I laid down, in fact, with my clothes on in the bunk I tried to holler but I couldn't very well breathe.

Q. And then what happened?

A. Then a boy, Mr. Joncich's nephew, passed by me and I motioned with my hands to him to come over. And so he was very close to where I was laying down and saw there was something wrong with me. And he asked me—I could hear what somebody says but I couldn't talk, from pain. And I was scared I was going to die. Something came over me, terribly. I never experienced this before in my life.

Q. Did you ever have this kind of pain or this kind of feeling at all? [129]

(Testimony of Anthony Vitco.)

A. No, Mr. Margolis, I never did experience anything like that.

Q. All right. Who was that? Was his name Joncich, too? A. Yes.

Q. What was his first name?

A. Miro, I think. We call him Miro Joncich.

Q. What did he say to you?

A. Then he went after the skipper.

Q. Did he say anything to you?

A. He asked me what was the matter with me.

Q. Did you reply?

A. I couldn't reply. I just went like this—I don't know what I did. I couldn't reply because I couldn't talk. I saw him but I couldn't——

Q. All right. Then did he go away?

A. He went after Mr. Mardesich. That's the skipper.

Q. And did he come back with the skipper pretty soon?

A. I didn't see him come back, but the——

Q. Did the skipper come back?

A. The skipper came with two of his brothers. I could hear him talking. I can tell by the voice. Maybe I was more out than, you know,—what I mean, I couldn't—but I can hear Joe. Mr. Mardesich came in, and his brother Tony and Nickie. They were helping me. [130]

Q. Did they say anything to you?

A. Well, Mr. Mardesich says, "What's the matter?" He asked me what was the matter. They saw

(Testimony of Anthony Vitco.)

I was sick and pretty soon they gave me some kind of a shot.

Q. All right. Then what happened?

A. Well, then I must have went to sleep. When they give me a shot it kind of makes me feel like —oh, different a little bit. And I must have went to sleep later.

Q. Now, did the pain subside after a while? Did the pain go away after a while?

A. Well, it didn't went away completely, but it didn't scare me any more like before. I felt better. I felt better. It didn't scare me, like I was going to die. It quiet me down a little bit, or something. I don't know.

Q. All right. Then you went to sleep?

A. Yes, sir.

Q. Did you wake up during the night?

A. Yes, sir, I did wake up.

Q. Do you have any idea about what time it was?

A. I don't remember, because I had the same feeling as before. It must have been nighttime. And I had the same feeling like before. I got cold and pain and scared, and the same thing like before. And there was a watchman. There is two men on a watch, or even three sometime—engineer and two watchmen. And one man passed by. I don't [131] recall who he was. And I did the same thing to this fellow as I did to Miro, called him over with my hands. And when he saw my—I guess the way I was, he went out to Mr. Mardesich, and he came

(Testimony of Anthony Vitco.)

down right away, I guess, and he did the same thing, I think, they did the first time.

Q. He gave you another shot?

A. Yes, sir.

Q. And when you say Mr. Mardesich, you mean the Mr. Mardesich who is the skipper?

A. He was the skipper, yes.

Q. You mentioned that he had two brothers, also.

A. Yes, sir. He got two brothers on the same boat.

Q. But the one that came down was the skipper?

A. The skipper and both of his brothers.

Q. Again?

A. Yes, sir. They were the ones that were taking care of me.

Q. All right. Then did you go to sleep again?

A. Yes, sir.

Q. When did you wake up again after that?

A. Well, I wake up in the morning sometime. I didn't have a watch with me. I don't know what time it was. But it was in the morning.

Q. How did you feel then?

A. Well, I felt a little bit better. Still pain, but [132] not that terrible crushing pain, and scared. I kept—I remember when I told Mr. Mardesich that I was going to die, and he told me that he called the Coast Guard and they were going—the plane will come over after me in Magdalena Bay. He changed the course and went toward the Coast Guard.

Q. By the way, where was the boat on the eve-

(Testimony of Anthony Vitco.)

ning of January 2nd at the time that this first attack took place?

A. Well, sir, I can tell you roughly. I am not a navigator. But we left the Guadalupe Island and we were going toward Secoura Island, which is more south, another fishing island. And in between there—of course, I can't remember. I don't think we were very far away from the first island, which is Guadalupe.

Q. You were then between Guadalupe and Secoura Island?

A. Yes. But I don't know how far we were from Guadalupe. The captain will correct me on that later. He knows.

Q. So you had this conversation with the skipper. You told him you believed you were going to die. Did you tell him anything else?

A. That was my feelings, sir.

Q. Did you tell him anything else?

A. I told him I want to go home because I like to see my two children and my wife before I die. The way I felt——

Q. By the way, you are married, are you? [133]

A. Yes, sir. I have two children.

Q. They live with you? A. Yes, sir.

Q. How old are your children?

A. They are 17 and 19.

Q. Now, what happened during the rest of the day?

A. Excuse me a minute. What day? What are you talking about?

Testimony of Anthony Vitco.)

Q. Now, do you want to rest for a minute?

A. Wait a minute. Go ahead.

Q. You woke up in the morning of January 3rd, ıe day after the attack. You remember that? And ɔu talked to the skipper. A. Yes, sir.

Q. You told us about that. Now, did you talk to ıe skipper later on that same morning again about hether you would go ashore or not?

A. Yes, sir.

Q. Will you tell us what happened at that time?

A. He told me, Mr. Mardesich told me that the ɔast Guard told him that they can—or they not ɔming when we got to this port where we was ıpposed to meet the Coast Guard, and he says that ılling to take me to the nearest port and send me ɔme with the plane, the private plane. But he 134] says he took my temperature and said, Tony,"—that is my name—he says, "You haven't ɔt any temperature." And he says, "If we will ɛnd you home——" There were not fish on board ɛt. He says, "It will be bad without cook." He ıys, "We have to go home; all of us in a case like ıat."

Of course, there is always someone that can cook. ut, he says, "We will go down south and if you ɛt bad again" he says, "you just got probably ɔld; something like that."

Q. All right. Did he say he was going to take ɔu in or going back out to the fishing grounds, ? what?

(Testimony of Anthony Vitco.)

A. No. He said, "We are going to go down to some fishing grounds."

Q. So the boat did not take you into a doctor or take you anywhere else at that time, is that right?

A. No, sir.

Q. Did you work that day?

A. That day?

Q. You had your attack the night of January 2nd. The next day was January 3rd. Did you work on January 3rd? A. No.

Q. Now, did you work for the next several days?

A. I worked after that. When we got on the fishing grounds I started.

Q. But my question is, did you work for a few days after January 2nd? [135]

A. Well, I don't recall the day. I know—I know I went to work. I remember I went to work when we got on the fishing grounds. And in between I did very little. I mean, I worked but I didn't work like I should.

Q. Well, when was the first time after you had the attack that you did any work?

A. I don't know. I think it took about four days to get on a fishing ground—must have. Then there was some fish to be seen in that spot where we were.

Q. Well now, Mr. Vitco, just try to listen to my question.

How long after you had the attack was it before you first did any work? You know, a day, two days, three days, four days; whatever it was.

Testimony of Anthony Vitco.)

A. What kind of work do you mean, sir? My ooking job?

Q. Well, any kind of work.

A. Oh, well, on the way down, I believe, a couple f days afterwards, I tried to do some cooking, hich didn't really went good. And then some guys ied to help me. I believe one day Mr. Lipich took ie kitchen, and he didn't want it, didn't like it. He ooked one meal. In other words, I was forced to ook most of the time until I got a plane to go to os Angeles.

Q. All right. Now, as I understand it for a cou- e of days you didn't do anything, is that right?

A. Yes.

Q. All right. Now, after that were you asked to art cooking, or did you just do it by yourself?

A. Mr. Mardesich, yes; as I told you. He came ver and he asked me if I wanted to cook; that here is some fish to be caught here and if I can ly cook *their* going to fish. Well, I give up. I did y best, Mr. Margolis. But my cooking wasn't as should be, because I worked about 10 minutes nd then I have to sit down or lay down—pain. I se aspirins three or four at a time to kill my pain. othing would help. Towards the evening I would et worse. When I climbed the steps to go on what e call "pilot towers" to get my potatoes, my meat, or instance, for the boys, I make those four or ve steps, whatever it is I can make, and then I ave to sit down and rest a little bit. So I didn't

(Testimony of Anthony Vitco.)

work the way I would have otherwise, if I was—but I tried.

Q. Now, during that time while you were out there in the fishing ground were some fish caught?

A. I believe we caught very little. I don't know how many tons, but not too many.

Q. Did you help in the fishing like the cook usually does?

A. The first day I did, sir. And then when I—just a little bit. My job is what we called on the lift line, and when I got hold of this lift to pull, well, my chest and [137] this arm of mine were absolutely pretty near paralyzed. I couldn't strain that, you know. Then Mr. Mardesich told me to get away and go in the kitchen and just cook and don't pull the net no more. And so I did.

Q. Now, did you later on have another severe attack like the first one that you had?

A. Yes, I did.

Q. When was that?

A. Well, that was—I had two later on, sir, if I recall.

Q. When was the first one?

A. The first one, before we went to Manzanito.

Q. Do you know the date?

A. It must have been 25th or 22nd of February. I mean——

Q. January? A. January, sir.

Q. And what happened? About what time of the day was it, and what happened?

A. Well, it was at nighttime, I believe, in the

(Testimony of Anthony Vitco.)

evening. The worst I usually get them at nighttime. Well, it happened that Mr. Mardesich went in with a boat and he went to see a doctor.

Q. No. What I want to know—please listen to my [138] questions, Mr. Vitco. I want to know about the attack now. What happened as far as the attack is concerned?

A. Oh, it's the same story, Mr. Margolis; the same way; the same, painful, frightened thing that came on me like always. I get chill and cold and pain in my chest and pain in my arm and afraid I am going to die—the same thing.

Q. Then when that happened did the boat go into port?

A. Well, he thought it might be a good idea to see a doctor—Joe Mardesich—and we went in Manzanillo.

Q. And how far out of Manzanillo were you at the time you had the attack, do you know?

A. I don't recall, sir. Maybe 10 or 12 hours out, which would be—I am not sure. I don't want to commit myself to the mileage because——

Q. Well, were you able to get in in about a day or so to Manzanillo? A. Yes, sir.

Q. And did you go there to see a doctor?

A. Yes, sir.

Q. How soon after you had this attack about the 22nd or 23rd or 24th of January, how soon after you had that attack did the boat leave for Manzonillo?

A. Well, Mr. Margolis, there is one thing that

(Testimony of Anthony Viteo.)

I don't recall, if we went right there or if Mr. Mardesich went the next day. I don't recall. I don't want to say one thing [139] from the other. I don't recall.

Q. It was either right after the attack or the next day?

A. Well, there I can't tell you when we went in. I know we went soon, but I don't know if we went in the night or the morning. I don't want to say.

Q. Now, did you see a doctor there?

A. Yes, I did.

Q. Do you remember the doctor's name?

A. Well, I remember I see him, but I don't remember his name. I mean, I could recognize him when I see him, but I don't remember his name. It was in a hospital in Manzanillo.

Q. Would Martinez mean anything to you, Dr. Martinez?

A. It could be, sir. That sounds like him.

Q. Did you go to the doctor alone or did you go with somebody?

A. Well, I went—Mr. Mardesich, the captain, went with me. And the broker.

Q. What do you mean by "the broker"?

A. The broker is a man that clears the boat in and out from the port—I would say, a Mexican or custom broker.

Shall we say a Mexican or custom broker, something in that line. A broker sees your papers and clears your entry and departure of the port.

(Testimony of Anthony Vitco.)

Q. So the three of you went to see this Dr. Martinez? [140] A. Yes, sir.

Q. Where did you go to see him?

A. In the hospital.

Q. And did he examine you there?

A. Well, yes, he did, and he didn't. He hasn't go much equipment to examine a person in that hospital.

Mr. Sikes: May I move that the answer be stricken, your Honor, on the ground that it is a conclusion of this witness relative to a medical question?

Mr. Margolis: Well, I think whether there is any equipment or much equipment in the hospital is something a layman can know as well as a doctor. He may not be able to describe it.

The Court: Denied. You may go into it in detail on cross examination if you so desire. The motion is denied.

Q. (By Mr. Margolis): About how long did the doctor take to examine you, if you remember?

A. Oh, I guess we were there about 10 minutes, something like that—15.

Q. And did the doctor speak English or Spanish? A. He spoke Spanish.

Q. Did he speak English, also, as far as you could tell? A. A few words, I believe.

Q. But did he carry on his conversation mostly in [141] Spanish?

A. He did it all in Spanish because the broker,

(Testimony of Anthony Vitco.)

sir, the other man that was with us, he speaks English pretty fair, I would say.

Q. All right. So in the conversation, you would be telling us, if you tell us, about a conversation and it would be what the broker said in English that Dr. Martinez said, is that right?

A. Dr. Martinez, after he got through examining me, he told the broker, the way I complain about——

Mr. Sikes: Excuse me, please, if I may interrupt you. I don't know what is coming out here. I don't know whether this is something that the broker told him; whether the conversation is what the doctor said in English or Spanish, and I would like to interrupt at this time for an objection, sir.

Q. (By Mr. Margolis): Let's get this clear: After you got through the examination the doctor said something in Spanish, is that right?

A. He says everything what he meant, sir, in Spanish to the broker.

Q. And then the broker would translate into English? A. That's right.

Q. All right. Now, do you understand any Spanish?

A. I did that much, sir, yes. I do not to speak perfect, but I understand fairly well, and I can speak but [142] not much good. But enough to understand.

Q. Were you able to understand what the doctor said in Spanish or did you just understand what the broker said in English?

(Testimony of Anthony Vitco.)

A. I understood both of them, sir.

Mr. Sikes: I am going to object to that on the ground that it has not been established, there is no foundation at all that he can understand Spanish.

The Court: He says he can.

Mr. Sikes: That is a conclusion of his.

The Witness: Would you like to ask me, sir, a few words in Spanish?

Mr. Sikes: It makes no difference to me. I speak it as well as I do English.

The Court: Address the court.

Mr. Sikes: I am sorry, sir.

The Court: The objection is overruled. You may cross examine on his ability to understand or speak Spanish.

Mr. Margolis: I think there was a pending question to which there was an objection. May I have it read, your Honor?

The Court: Yes.

(Record read.)

Q. (By Mr. Margolis): What did the doctor say after the examination was completed?

Mr. Sikes: Objection, your Honor on the grounds that [143] this is entirely uncertain as to whether the answer to this question will be what the doctor said in Spanish or the alleged translation by the broker. And that is very important.

The Court: It calls for what the doctor said in Spanish. Now, that is the question.

Q. (By Mr. Margolis): All right. Now, tell us what the doctor said in Spanish.

(Testimony of Anthony Vitco.)

The Court: Say it in Spanish. Say just exactly what you heard the doctor say.

The Witness: The Spanish doctor said to the broker, "Esto persona esto mucho inferma."

Mr. Margolis: No. You want it in Spanish?

The Court: That is what the doctor said. And you asked for that, as I understand it.

Q. (By Mr. Margolis): Well, translate into English what you understood the doctor to say in Spanish.

A. He says, "This man seems to be very sick. Yo no tengo——"

Q. No. no. Translate——

A. That's what I say in Spanish first, "This man seems to be a sick man." And that's the quotation of that first word. "Yo no tengo facilitad." "I haven't got the facilities for this man——" we'll say to examine me, you know, perfectly. "Yo creo que sea mejor——" I think it would be the best—"que esto hombre a Estades Unidos" if you would send this man [144] to the United States in the hospital.

Q. All right. Was there a translation into English by the broker at that time?

A. Yes, sir. He told Mr. Mardesich.

Q. And did the broker say in English substantially what you have just said in English?

A. That's right.

Q. Then did you have a discussion with the skipper later on about what to do?

(Testimony of Anthony Vitco.)

A. Well, the skipper right there he asked the broker, "will you please"——

Q. Excuse me. Was the skipper speaking in English?

A. Yes, sir. Mr. Mardesich, the skipper, asked the broker, "Will you please ask the doctor if he could give us some penicillin, and I will try to take the man out a few more days, and if this doesn't help then then we are going to send him home." Being that they tried penicillin on me before and probably Mr. Mardesich thought that——

Q. Don't tell me what Mr. Mardesich thought,——

A. Excuse me.

Q. ——just what he said.

A. All right. We got the penicillin and we went out the same evening. I got in a pain again. Mr. Mardesich——

Q. When you say you went out, do you mean——

A. We went out fishing again. [145]

Q. The boat left to go to the fishing grounds?

A. That's right.

Q. The same fishing grounds you had been to before?

A. As I say, it is pretty hard when you are out from shore for an amateur or somebody like myself—if you don't see shore I can't know where we are. It's pretty hard for me to recognize. But the skipper can. He is a navigator and he shoots the stars.

We went out, and the same evening Nick Mardesich, the captain's brother, he gave me a shot of that

(Testimony of Anthony Vitco.)

Mexican penicillin, or whatever it was, I don't know. It wasn't the same as the United States stuff, because I saw some white crystal in one bottle and some liquid in the other, and he has to mix something.

Well, anyway, that makes me feel worse. In other words, I don't know if that did, but I was getting worse.

I don't recall how many days later, I got another attack.

Q. Now, in the meantime were you working?

A. I was working in the meantime, but not very many days later, sir, I got another attack.

Q. All right. Now when you say you were working, were you working——

A. Well, cooking, yes, sir.

Q. Were you able to work the way you had before the first attack? [146]

A. Never, never, no; never like before.

Q. Now, you had another attack within a few days after that, is that correct?

A. Yes, sir.

Q. Then what happened?

Well, I will withdraw that.

Was that attack about the same as the ones you had before?

A. This last one was just about the same as I had got the earliest one, the two bad ones, you know. Because in between I got a few, but not as bad as the two first ones and the two last ones that I got here. But the last one was bad because when

(Testimony of Anthony Vitco.)

Mr. Mardesich came down in my bunk and saw me, then he called the broker to get the plane ready and then they took——

Q. You say he called. Do you mean——

A. Radiophone. We have a radiophone which you speak from shore to ship. And this particular broker happened to have the same thing on the shore. He can speak to the boats.

Q. I see. And after this attack you were taken in, is that right? A. Yes, sir.

Q. All right. Now, you were brought in. Was this the same broker at Manzanillo?

A. Same broker, same place.

Q. And how long after the attack, this last attack was [147] it before the boat started to go back?

A. I believe he went right away, sir. I am not sure, but I believe so.

Q. Then how long did it take to get in this time? Do you know?

A. There again I can't tell you how long. I don't say a day or two, but I don't know how long it took.

Q. During this time you stayed in your bunk, did you? A. That's right.

Q. When you got to Manzanillo what did you do?

A. They took me ashore. The broker had the ticket ready—yes, the broker had the ticket ready for the small plane from Manzanillo to Guadalajara, and he took me to the plane, the broker. And

(Testimony of Anthony Viteo.)

he had a wife and two children along. They took me to the plane, which is a little outside Manzanillo. And from there—the plane came in; in fact, the same time we did with the car. And I board that plane and went to Guadalajara.

Q. Now, how long after you got to Manzanillo did you leave on this plane? A. Not too long.

Q. What do you mean? Two or three days? Two or three hours?

A. No, no. Hours, not days.

Q. All right. And then when you got to Guadalajara [148] were you able to get on a plane right away?

A. No. There I was supposed—to tell you the truth, I was supposed to stay up for 12 hours in the lobby in the old hotel. I couldn't get the room. And I went through misery in that city. And then I wait for about 12 hours in Guadalajara, and I believe I board the plane around 6:00 or something —anyhow, in the morning, the next morning. I came in Guadalajara in the afternoon the previous day. I boarded the plane the next morning in Guadalajara and I got in Los Angeles airport around 6:00 or 7:00 or something like that. It took us, I guess, about seven hours.

Q. All right. Now, do you know what date it was that you arrived in Los Angeles?

A. I believe it must have been, Mr. Margolis, around—I am getting to where I haven't got much breathing system left in me.

(Testimony of Anthony Vitco.)

Mr. Margolis: I wonder if we could have a recess.

The Court: Oh, yes.

The Witness: I am getting tired.

The Court: You had better take a little rest.

Mr. Margolis: Can we have about five minutes, your Honor?

The Court: It is 25 minutes to 12:00. Do you want to resume?

Mr. Margolis: Could we perhaps have lunch now and come back a little early? Would that be convenient with your [149] Honor?

Mr. Sikes: If the court please, I have to see my doctor between 1:15 and 1:30 to talk to him for a few minutes before he takes the stand.

Mr. Margolis: Maybe we could resume at 1:30.

Mr. Sikes: I said between 1:15 and 1:30. I would appreciate it if the court would make it 1:45, sir.

The Witness: I am very sorry, your Honor.

The Court: You take some rest.

The Witness: I am getting to where I can't do too much more talking.

The Court: You rest during the noon recess. We don't want you to have an attack just to finish a court session. You take some rest during the noon recess.

We will recess until 1:45.

(Whereupon a recess was taken until 1:45 o'clock p.m. of the same day.) [150]

Thursday, February 24, 1955; 1:45 p.m.

The Court: Are there ex parte matters?

The Clerk: No, your Honor.

The Court: You may proceed with the case on trial.

Mr. Sikes: If the court please, may I call out of order my doctor here?

Mr. Margolis: No objection, your Honor.

The Court: You may.

Mr. Sikes: Thank you.

Dr. Bullock.

LEWIS T. BULLOCK

called as a witness by the respondents, being first sworn, was examined and testified as follows:

The Clerk: State your name, please.

The Witness: Lewis T. Bullock, L-e-w-i-s, B-u-l-l-o-c-k.

Direct Examination

Q. (By Mr. Sikes): Dr. Bullock, are you a doctor of medicine licensed to practice in the State of California? A. Yes, sir.

Q. Where did you receive your M.D.?

A. The University of Pennsylvania.

Q. And since you obtained your M.D. have you followed any particular specialty? [151]

A. Yes, sir. I am a specialist in internal medicine, with a primary interest in cardiology.

Q. Did you have any postgraduate studies in your specialty?

A. Yes. I spent two years at the Medical Cen-

estimony of Lewis T. Bullock.)

of Columbia University in New York City. en I spent a year at Harvard studying the circu- on in the Physiology Department with Dr. Can- . Then I came out and spent a year at the Uni- sity of California Hospital in San Francisco ler Dr. Kerr.

Q. Have you had any positions as a member of society in connection with your specialty?

A. I am a former member, former president of Los Angeles Heart Association. I am a former sident of the California Heart Association, and the board of the American Heart Association. m at present a member of the board of directors the California Heart Association. I am at pres- a member of the board of directors of the Los geles Heart Association. I am at present chair- n of the Research Committee of the Los Angeles art Association, which spends the majority of funds raised in the current campaign.

Q. Have you had any teaching assignments since obtained your M.D.?

A. Since coming to Los Angeles in 1934 I have n on the faculty of the USC Medical School. I now associate [152] professor of medicine at C. I am also cardiac consultant at the Chil- n's Hospital, where we also teach about heart ease in children. I am senior attending physi- n in the County Hospital and do a great deal of ching there. I was formerly chairman of the dical staff at the County Hospital.

Q. The chairman of the staff——

(Testimony of Lewis T. Bullock.)

A. Medical section of the staff, yes.

Q. Now, Doctor, did you make an examination of Mr. Vitco, Mr. Tony Vitco? A. Yes, I did.

Q. Will you tell us first of all when you made your examination?

A. On August 26, 1953, and a few days thereafter. It took several days to complete it.

Q. Could you give us your best estimate as to how many days were necessitated for your examination, if you recall?

A. I would say three or four, but I don't remember. We see such patients and spend an hour with them on the first visit, and then various tests are done following that first visit, and then that is reviewed and analyzed, and sometimes that is done the next day or it might be a week later. I do not remember exactly the dates of appointments for the subsequent laboratory studies for X-rays and things of that sort. [153]

Q. Did you have an electrocardiogram taken of Mr. Vitco? A. Yes.

Q. Do you happen to have it with you, or the tracings from it?

(Whereupon the document was handed to counsel.)

Mr. Sikes: If the court please, Dr. Bullock has handed me two sets of tracings, each of which in turn consists of two pages and these are, as he has testified, those of Mr. Vitco, and I should like to offer them into evidence at this time, sir.

The Court: Is there any objection?

Testimony of Lewis T. Bullock.)

The Witness: Your Honor, may I ask if I can certain to get these back. These are my only cords. They have not been reproduced. I would nt to be very certain that my original office recds are not taken permanently.

Mr. Margolis: I assume we will have a stipulaon that all medical records may be photostated d substituted.

Mr. Sikes: I will stipulate to that at this time.

The Court: Photostatic copies may be placed th the clerk instead of the originals?

Mr. Sikes: Yes, sir.

Mr. Margolis: Yes, your Honor.

The Court: So ordered.

This will be Respondents' next exhibit in order.

The Clerk: C, your Honor.

The Court: C-1 and C-2.

The Clerk: C-1 and C-2 in evidence.

(The exhibits referred to were received in evidence and marked Respondents' Exhibits C-1 and C-2.)

Mr. Margolis: Could we have the dates on those, r. Clerk?

The Clerk: August 26, 1953, would be C-1 and ugust 28, 1953, would be C-2.

Q. (By Mr. Sikes): Doctor, at the time that ou examined Mr. Vitco on that series of dates ere in August and after you had seen the electrordiograms, could you give us your opinion as to hether the electrocardiograms were within normal mits?

(Testimony of Lewis T. Bullock.)

A. They were within normal limits. That is both before and after exercise. I should emphasize that one of these is taken with a very particular technique following strenuous exercise in order to bring out any abnormality that would not normally be shown. And so the two have to be interpreted with that in mind.

Q. Now, Doctor, have you had an opportunity to see Exhibits 3-A through, I believe, 3-F? It is a series of electrocardiograms taken by Dr. Abowitz from March of 1952 up through December of 1954. Have you had a chance to observe those?

A. Yes, I have. I assume you are referring to the ones I saw within the last hour on the table.

Q. Yes.

Mr. Sikes: I represent to the court that those were the exhibits to which I have referred.

Q. (By Mr. Sikes): Now, Doctor, have you also had an opportunity to see copies of the Coast Guard messages between the vessel Pioneer and the United States Coast Guard which are Exhibits 2—these are at least part of them. Have you had an opportunity—have you ever seen those, copies of them?

A. I haven't seen this form of it. I presume I have seen the same thing.

Q. I see.

A. I have another list here of messages which I presume is identical.

Q. All right. Would you care to take up the other list, and I will show it to counsel here.

'estimony of Lewis T. Bullock.)

Mr. Margolis: If you tell me it's the same ing——

Mr. Sikes: It is the same thing, leaving out the utical terms. I will show it to counsel, with the urt's permission.

(Whereupon the documents were shown to counsel.)

Mr. Sikes: May it be stipulated then, counsel, at Dr. Bullock has in his possession and is testiing from [156] copies of the messages which are ntained in Exhibit 2?

Mr. Margolis: A quick glance so indicates, and will accept counsel's word for it.

Mr. Sikes: Thank you, very much.

Q. (By Mr. Sikes): Now, have you seen Exbit 6, which is not the original, but is a photoatic copy of the electrocardiogram of Mr. Vitco the United States Public Health Service in San edro on March 7, 1952?

A. Yes, I have. I have seen all of these exhibits u now refer to.

Q. Now, drawing your attention to Exhibit 6, hich is the electrocardiogram taken on March 7, 52, about five or six weeks after Mr. Vitco rned to the United States, will you tell us if in our opinion the electrocardiogram reveals the art to be within normal limits?

A. I don't think one can say from reading an ectrocardiogram that the heart is or is not within ormal limits. I would say that the electrocardioram in itself, this electrocardiogram does not

(Testimony of Lewis T. Bullock.)

prove the presence of any type of heart disease and it is within normal limits for an electrocardiogram.

I would agree with the conclusion that the Coast Guard made that these variable changes here are not specific. I find no reason for disagreeing with their conclusion on the subject. [157]

Q. Incidentally, I forgot to tell you that there is a part of that which really isn't in evidence. That is, this part under "Remarks."

Mr. Margolis: I am perfectly willing to stipulate that it may go in evidence.

Mr. Sikes: Well, it simply isn't in evidence.

Mr. Margolis: Yes. Counsel is correct. And I will stipulate, if you like, to the doctor's remarks concerning that which is not in evidence going out, if counsel wishes that stipulation. Otherwise, it should go into evidence.

Mr. Sikes: That's all right. I just wanted to tell him.

The Court: Do you wish the doctor's observations and conclusions stricken?

Mr. Sikes: No, sir.

Mr. Margolis: Then I think the whole document should go in evidence.

The Court: Then you may leave the door open for the "Remarks" to come in on cross examination.

Mr. Sikes: Well,——

Mr. Margolis: I don't want to take advantage of what happened, but if it is opened, I am going to take advantage of it.

Testimony of Lewis T. Bullock.)

The Court: Otherwise counsel couldn't cross examine on that phase of his answer.

Mr. Sikes: That's true. [158]

Well then, in view of that, may I move at this me, your Honor, that Dr. Bullock's remarks and is statement with regard to his conclusion concerning the diagnosis on Exhibit 6 be stricken?

The Court: Dr. Bullock's remarks as to his observations of the Coast Guard's conclusion. Is iat it?

Mr. Sikes: Yes, your Honor.

The Court: Very well. That will be stricken. hat is only a portion of the answer.

Mr. Sikes: Yes, sir.

Q. (By Mr. Sikes): Now, are the symptoms as et out by the captain of the vessel in the series of iessages, Exhibit 2, are those consistent with an ttack of pharyngo-esophagitis? A. Yes, sir.

Q. Are the symptoms as set out in those same iessages—first of all, are they entirely consistent ith a heart attack on the vessel?

A. There are certain aspects of them which are ot consistent with a simple heart attack.

Q. And what are they, if you would care to go irough them, Doctor?

A. Well, it refers to a "slight tickling in the iroat," and we must of course always be cautious i interpreting this type of data because it is being ransmitted through [159] non-medical people. But ccepting it as a reliable description of the symptoms at the time, the primary symptom of a slight

(Testimony of Lewis T. Bullock.)

tickling in the throat would not be what one would expect a patient to have who was having a severe heart attack. The strangulation effect might be interpreted either way, as to whether one was having trouble swallowing or difficulty in breathing, it suggests difficulty in swallowing and strangling rather than a pain in the chest.

The emphasis upon fever and temperature would not be expected in the early stages, the first onset of a heart attack. And temperature would be incidental and minor compared to other major symptoms which a heart attack would produce.

I think those are the major things that would make one question the diagnosis of coronary thrombosis at that time as compare to an infection in the throat.

Q. Doctor, does penicillin——

A. May I mention one other thing? The position of the ailment is from the Adam's apple to the shoulder blade. That location of the trouble, "shoulder blade in the windpipe" would be a most unusual description of the trouble from a coronary thrombosis. Pains in the windpipe are unusual and not to be expected. A feeling that something is lodged in the windpipe would be inconsistent or unexpected; and particularly, I would emphasize the statement [160] in one of the messages that it is awfully hard for him to swallow. The difficulty in swallowing is a rather specific statement which would give strong evidence as to where the problem was, where the disease was, and would not be the

estimony of Lewis T. Bullock.)

rmal symptom of a patient with coronary throm-
sis.

Q. Doctor, does penicillin have any effect, any
utary or any other effect on a heart attack, some
rona[illegible] attack?

A. We should define "heart attack." And as-
ming that we are referring to the one that is most
dely known, that is a coronary thrombosis or a
t in a coronary artery, penicillin would have no
luence one way or the other.

Q. If Mr. Vitco had in fact been suffering from
ne infection in the throat or gullet, would peni-
lin have any salutary effect on it?

A. Yes. It would be expected to cure it, or help
—relieve it—be of great value in its treatment.

Q. Incidentally, at the time that you examined
r. Vitco in August of 1953, was there any sign
that time that he was suffering from any type
pharyngo-esophagitis? A. No.

Q. Now, taking the series of electrocardiograms,
A, -B, -C, -D, -E, -F, -G and -H—I believe—
ose that were made by Dr. Abowitz, you stated
at you have looked at those, haven't you? [161]

A. Yes.

Q. Will you tell us your opinion as to what they
veal over a period, over the period covered
ereby?

A. They reveal records which are within the
nits of normal variations. There are some ques-
onable changes that vary back and forth from

(Testimony of Lewis T. Bullock.)

time to time. None of these are definitely within the normal limits. There is no conclusion that one could reliably draw from this series as to the definite presence of any type of heart disease.

Mr. Sikes: If the court please, sometime ago I sent to Dr. Bullock a copy of the deposition of Mr Mardesich, one of the respondents. That is not admissible here and I well realize it. I am going to phrase a question which will carry several assumptions in it which I later intend to prove by Mr Mardesich, and I wanted to preface my question with that remark, that these assumptions are in there, and the basis of the question, and that if they are not brought out by the evidence then it is obvious that Dr. Bullock's opinion on that particular point, based thereon, will be of no value.

The Court: Since you called Dr. Bullock out of order I suggest you put your question, and perhaps Mr. Margolis would be willing to forego the objection upon the representation that those assumed facts will lated be placed in evidence.

Mr. Margolis: I don't think we have the same problem here as we do in a jury trial, your Honor I am perfectly [162] prepared to assume that if there is no foundation your Honor will disregard the answer.

Mr. Sikes: Thank you, your Honor. And thank you, Mr. Margolis.

Q. (By Mr. Sikes): Taking into consideration your views of and your inspection of the series of electrocardiograms, 3-A through 3-H, and taking

estimony of Lewis T. Bullock.)
o consideration your inspection and analysis of
contents of Exhibit 2, the Coast Guard mes-
es; and taking into account your own electrocar-
grams, Exhibits C-1 and C-2; and your own
er physical examination of Mr. Vitco; and as-
ming that Mr. Vitco on the incident of his first
ack on board the Pioneer, this vessel, he said
t he was sick and he did not feel right; and
ther that he did not say that he was dying but
t he thought there was something wrong with
throat; and that he, Vitco, noted—no, that he,
tco, said he had a slight tickling in his throat,
d on that day his temperature picked up in the
se that it increased; and that the position of the
ment was from his Adam's apple to the shoulder
de in the windpipe; and that some three or four
ys later, after waiting in Magdalena Bay Mr.
tco said that his throat was bothering him, and
uming that he was examined in Manzanillo on
about January, somewhere between the 24th and
h, by a Mexican doctor who diagnosed his condi-
n as pharyngo-esophagitis; and assuming, fur-
r, that Mr. [163] Vitco never said anything at
specifically about difficulty with his chest or his
art; and assuming, further, that Mr. Vitco ex-
essed a desire not to return to the United States;
d assuming further that the visit to the Mexican
ctor was at the insistence of Mr. Mardesich, the
ipper, and not at that of Mr. Vitco; do you have
opinion, Doctor, based on all of those things, as
whether Mr. Vitco had a heart attack or a series

(Testimony of Lewis T. Bullock.)

of them on board the Pioneer or some other vessel in January of 1952?

Now, just hold it one second, Doctor. Mr. Margolis has stood up.

Mr. Margolis: I think, your Honor, there are many objections to the form of the question, but I am not going to make any of them except one, and that is the assumption relating to the diagnosis of a doctor in Mexico, on the grounds that that would be meaningful only if he was told everything about what that doctor had done, to arrive at that diagnosis and the basis therefor. The mere fact that a doctor in Mexico had made that diagnosis——

The Court: I will say this much, that the facts in evidence—the deposition is here, Mr. Sikes, but when you interpolate one doctor's opinion into a hypothetical question seeking another doctor's opinion, it seems to me you are not only unfair to the doctor on the stand but you are destroying the usefulness of his opinion. [164]

Mr. Sikes: All right. Then with the court's permission——

The Court: Because you are asking him to predicate an opinion upon an opinion.

Mr. Sikes: Then with the court's permission may I say this, without the necessity of repeating that entire question to Dr. Bullock,——

Q. (By Mr. Sikes): Will you exclude from any consideration whatsoever the diagnosis allegedly made by the Mexican doctor, and then after excluding that from all of this other evidence, do you have

(Testimony of Lewis T. Bullock.)

a opinion as to whether Mr. Vitco suffered a heart attack on board this vessel in January of 1952?

A. Yes.

Q. What is your opinion?

A. I do not think that he did. And I am certainly not able to find any evidence to prove that he did.

Mr. Sikes: You may cross examine.

Mr. Margolis: There will be a point, your Honor, at which I will ask to examine the doctor's records. But I think that can be done during the recess, and I can proceed with examination in the meantime.

The Court: Very well.

Is Exhibit A to the deposition of the Mexican doctor in evidence?

Mr. Margolis: Yes, your Honor. But your Honor will [165] recall there was a question of reservation as to an objection. It is in evidence and I have no objection to your Honor considering the whole——

The Court: I haven't examined it as yet.

Mr. Margolis: There is no objection to it, of course, but I do want to make it clear that I think there are objections to portions of it. Incidentally, my objections may end up as only going to the weight of the deposition rather than its admissibility.

The Court: Very well.

(Testimony of Lewis T. Bullock.)

Cross Examination

Q. (By Mr. Margolis): Dr. Bullock, one layman's translation of another layman's symptoms, you would not consider very reliable, would you?

A. One uses it with considerable hesitation and care and caution and judgment.

Q. And a much better basis for determining what was wrong with a man at a particular time is for a doctor to examine him and to ask him about the symptoms that he suffered at that time, because the doctor knows how to extract the correct information, isn't that so? A. Yes, sir.

Q. Now, Doctor, if upon such an examination the man gave you a history that at the time of those attacks that [166] we are talking about he felt the oppression of death, he felt the impendency of death, and that he had a pressing and crushing pain in his chest, and that this pain radiated out to his shoulder and arm, that would considerably affect your opinion, would it not, Doctor?

A. Yes, sir.

Q. And if you had that kind of a history your conclusion would be that probably there was a heart attack, isn't that so?

A. That history sounds very typical and classical of a heart attack.

Q. Now, Doctor, is the term pharyngo-esophagitis, is that term commonly used in the United States?

A. Well, it would not be unusual. We call it a strep throat or a pharyngeal abscess or a paritonsil

Testimony of Lewis T. Bullock.)

bscess or symptom. They are all referring to the me thing.

Q. Well, that's the first part. That's the sore roat part. The esophagitis has nothing to do with e throat, has it?

A. Well, it would be the upper part of the ophagus, and I am sure he would be referring to hat we call the paritonsilar abscess, I am sure.

Q. That is your interpretation of what it means. ut, typically, esophagitis is a disease or illness of ie esophagus and originates much lower down than ie throat, [167] isn't that right?

A. Well, the esophagus connects with the throat, nd when the throat is involved the upper part of ie esophagus is almost always involved to some xtent. And so the term would refer—when you say oth you don't say how far down the esophagus you o, but the thing you see very frequently is an in-ammation at the border line, too, which is a very requent disease. It's not unusual.

Q. What are the typical symptoms of this dis-rder?

A. Sore throat and fever—difficulty in swal-owing.

Q. Anything else?

A. Those are the major things. Increased white ount. The throat would be inflamed and infected f you looked at it.

Q. It doesn't involve recurrence of severe at-acks, does it?

A. A paritonsilar abscess may very well, par-

(Testimony of Lewis T. Bullock.)

ticularly if it is not treated properly originally——

Q. Paritonsil abscess? A. Yes.

Q. Is that the same thing as this other thing we are talking about?

A. Yes, they are all within the same group of terms.

Q. Well, if you saw that sort of an abscess and you were making a diagnosis, you would call it that, would you [168] not?

A. Well, it would be a subdivision of the same term. The terms used by different physicians in different countries may vary slightly, all within the same group.

Q. Well, not every pharyngo-esophagitis involves an abscess, does it?

A. Not necessarily.

Q. So that is just simply an assumption that there is an abscess as part of that?

A. That's right.

Q. You are simply assuming that if there were an abscess there could be recurrent attacks, is that right? A. Yes.

Q. What would be the nature of those attacks?

A. Recurrent pain and tickling in the throat and possibly fever and possibly difficulty in swallowing.

Q. That is all? A. Yes.

Q. You wouldn't have recurrent attacks in which a man couldn't catch his breath, and afterwards could catch his breath?

A. You could very well have difficulty in breath-

Testimony of Lewis T. Bullock.)

ng with it; the same as difficulty in swallowing.

Q. You mean a man could go through an attack which he just couldn't catch his breath and then would subside [169] and then a couple of hours later there would be another attack and this would be a sort of symptom you would expect from this type of disorder, Doctor?

A. It would be perfectly possible.

Q. It wouldn't be very likely, would it, Doctor? Have you ever seen that? A. Yes.

Q. You have?

A. Let's say that difficulty in breathing, difficulty in swallowing is frequently a characteristic symptom of a severe infection in the throat, usually associated with an abscess at the time. And those symptoms are not constant. They will be bad and varied to some extent. It is not characteristic of sudden severe attacks and then going away.

Q. That is not characteristic? A. No.

Q. Where you have a sudden severe attack and then the man goes to sleep and feels pretty well and then you have another sudden severe attack. That isn't characteristic, is it, Doctor?

A. Not to keep on doing that, no. It might come back after some days or——

Q. But that is characteristic of a heart attack, isn't it, Doctor? I mean, it is the sort of a thing that is certainly not unexpected in a heart condition. [170]

A. Yes. We need to define the frequency and times and durations of these attacks, and I am get-

(Testimony of Lewis T. Bullock.)

ting a little confused as to exactly the duration and frequency that we are referring to and whether we are referring to coronary thrombosis or angina; and the two are quite different.

Q. Well, let's encompass within that any kind of a heart condition. I am talking about any kind of a heart condition.

There are heart conditions, are there not, in which a man will have an attack that might last 10 minutes, or so, 15 minutes, and then subside, and then a few hours later, will have another severe attack, and then he will be relatively free of the attacks, is that right?

A. That is characteristic of angina pectoris, yes.

Q. And not characteristic of the esophagitis?

A. No, not to be completely free. If we assume complete freedom of any symptoms between, it would not be consistent with esophagitis.

Q. Now, I think you said that penicillin would help the esophagitis—— A. Yes.

Q. ——over a period of time.

Now how long would it take before it did any good?

A. Well, that would depend upon the severity of the infection; the sensitivity of the particular bacteria [171] producing the inflammation of the throat and upper esophagus; and the dose of penicillin.

Q. What is the minimum time?

A. And the individual.

Testimony of Lewis T. Bullock.)

Oh, it could make a great deal of difference in ve or six hours.

Q. But it couldn't do anything in 15 or 20 min-tes? It could have no effect at all, could it, Doc-or? A. In 10 minutes?

Q. 10 minutes or a half hour. A. No.

Q. None whatsoever? A. No.

Q. Now, if the penicillin reduced the tempera-ire and there was an esophagitis condition, you ould expect the symptoms to quiet down, wouldn't ou?

A. You would expect them to improve.

Q. You would expect them to improve. You ouldn't expect the symptoms to get worse, would ou? A. No.

Q. So that if following the penicillin the chok-ng gets worse, although the temperature goes down, at's a sign, is it not, Doctor, that the symptoms re not attributable to esophagitis but to something lse?

A. And one would think that something else was n [172] abscess which was not drained.

Q. Could it be also a heart condition?

A. Well, anything could be.

Q. Well, not anything, Doctor. Isn't that the ort of thing that if you had a heart condition and ou treated it with penicillin and you also had ever, the fever might go down but the symptoms f the heart condition, such as strangulation, might et worse?

A. If the fever were due to a heart condition

(Testimony of Lewis T. Bullock.)

the penicillin would not reduce the fever. It would have no influence on it.

Q. But, Doctor, it is entirely possible, is it not, that a man having a heart condition could also have a sore throat? A. It is possible.

Q. It is possible? A. Yes.

Q. It wouldn't be at all extraordinary or remarkable if that were to occur, would it, Doctor?

A. It is possible. It would be unusual for them both to develop at identically the same time.

Q. Well, unusual merely in the sense that it would be a coincidence, isn't that right? One isn't inconsistent with the other, is it?

A. It's not impossible. [173]

Q. Well, is one inconsistent? Does the fact that you have a sore throat make it less likely that you would have a heart attack.

A. It is not impossible.

Q. Doctor, answer my question, please. Does the fact that you have a sore throat make it less likely that you are going to have a heart attack?

A. If you have certain symptoms developing and you assume those symptoms are due to separate and unrelated conditions, it's medically a basic fact that you will most likely be wrong and you are betting on a percentage chance that is so far off that no diagnostician will accept that unless the combination of most unusual circumstances is supported by reliable evidence.

Q. Doctor, I wonder if you could answer—I am a little lost. I am sorry.

Testimony of Lewis T. Bullock.)

Could you answer this question yes or no, and hen explain it: Is a man with a sort throat less kely to have a heart attack than a man who does ot have a sore throat? A. No.

Q. So that if a man has a sore throat, the peni-illin might help the sore throat and not help the eart condition at all, is that right?

A. Yes.

Q. And if the temperature was due to the sore hroat [174] under those circumstances the peni-illin might reduce the temperature, but the symp-oms which flowed from the heart attack would hemselves be continued, persist, or might even get vorse, is that right?

A. That would be possible.

Q. Whereas if, otherwise, you would expect the enicillin to help the condition overall. Right?

A. If you gave enough and kept it up long nough. But you don't cure them all with just any ose.

Q. I said "help." You would expect the peni-illin to help the condition overall? A. Yes.

Q. Now, Doctor, angina pectoris is a particular ype of pain which is brought about by a sudden ack of blood in a portion of the heart, isn't that ight, Doctor? A. A certain relative lack.

Q. Relative, yes. And it may be due to any one f several different causes, isn't that right? I nean, for example, there might be a blockage or here might be simply a spasm which causes it, isn't hat right?

(Testimony of Lewis T. Bullock.)

A. Those two things could cause it. If you had a blockage it would not be angina. It would be called a different term and a different name when it is completely blocked. Angina refers to a temporary change and not to occlusion of the artery.

Q. It is a fact, isn't it, that angina is sometimes used in different senses? It is sometimes referred to and sometimes to what is really a disorder in and of itself. But classically it refers basically to the pain rather than to the symptom of disorder, isn't that right, to the heart pain?

A. With the exception that the pain of a very similar character is produced by a clot forming in the artery which is called coronary thrombosis. And the picture of the pain and the diagnosis and the terms used for the pain produced by an actual thrombosis, an obstruction, is different from that of a temporary spasm in which we more characteristically use the word angina. And I would be clear as to what we were referring to if we maintain that distinction.

Q. All right, Doctor.

Now, it is true, isn't it, that many patients with coronary artery disease will have it for years without presenting any objective evidence of the disorder, or even sometimes without a pain?

A. Oh, yes.

Q. So simply the fact that there is no objective evidence of angina pectoris does not necessarily lead to the conclusion that it doesn't exist, is that right?

'estimony of Lewis T. Bullock.)

(No response.)

Q. Well, the lack of objective evidence of an-na [176] pectoris does not necessarily lead to the nclusion that it does not exist, is that right?

A. Your question is a little confusing to me, cause I am not sure that we are agreeing on rms.

Angina pectoris is, by definition, the symptom of in. I think you are referring to the cause of that, at is, coronary arteriosclerosis, which may be esent without any objective symptoms or any ob-ctive findings. And that may be present for a ng period of time before symptoms develop. Since limit the diagnosis angina to the person who has in, we can't have that diagnosis made without e presence of the symptom. But we can have the eliminary preceding organic change in the artery, at is narrowing, to some extent narrowing, and e development of arteriosclerosis for a long time fore any temperature develops.

Q. And it is also true, isn't it, Doctor, that the in, angina pectoris, may arise long before there any objective showing of the cause of that pain?

A. Yes.

Q. Now, that's a pain that is usually felt under ie sternum, isn't it, Doctor, the pain of angina ectoris; and the chest—the man feels a pressing, rushing down on his chest? A. Yes.

Q. And sometimes it gets up around the neck, n't that [177] right?

A. It may radiate to the neck.

(Testimony of Lewis T. Bullock.)

Q. It gets up around the neck so that a layman might refer to it as being the windpipe?

A. He might.

Q. And it gives rise to a sense of choking or suffocation or strangulation, is that right?

Mr. Sikes: I am going to object to that question on the grounds, your Honor, that it is very confusing. There are three symptoms described in the disjunctive.

The Court: The doctor will be able to answer. Overruled.

The Witness: Choking is an unusual symptom—it is rare that I ever hear patients use that word. Strangulation—I don't remember any patient using the term. They have a feeling of suffocation and diffculty in breathing and they are very short of breath and they are obviously struggling to breathe; but in the absence of extreme dyspnea they don't use the words "strangulation" or "choking."

Q. (By Mr. Margolis): That is the sort of a term that a layman describing what he saw happening to somebody else might well use, isn't that right? A. It would be possible, yes.

Q. And shortness of breath, the sort of difficulty of catching your breath, is virtually always one of the symptoms, is it not?

A. It very frequently and usually is. And we are now [178] referring, however, to coronary thrombosis and not angina, and we must constantly distinguish between those two. Shortness of breath does not occur in angina.

estimony of Lewis T. Bullock.)

Q. Doctor, do you predicate that upon your own perience alone, or upon your own experience and iat the authorities say on the subject?

A. Oh, that is generally accepted. And we are ıfusing two conditions here, I think, is where ne trouble is arising.

Q. Are you, Doctor, in this connection familiar th, and do you rely to any extent in giving your inions upon the works of Boaz?

A. Well, having seen several thousand patients, don't need to read Boaz.

Q. You don't depend on Boaz at all? He is nsidered one of the leading authorities in the ld, is he not?

Mr. Sikes: I am going to object to that, your onor, on the grounds that it is immaterial. The ctor has already stated he does not rely on Boaz d, therefore, this type of cross examination is imaterial and not proper.

The Court: Sustained.

Would your terminology be easier, Doctor, if you mply referred to "heart failure" or "heart disse"?

The Witness: No, sir. We have to distinguish tween angina and coronary thrombosis; and have be specific as to which we are referring to when e are talking about the [179] symptoms which ay be present. And the symptoms are entirely fferent in the two. I will be glad to elaborate at rther length to clarify that problem, if you like.

(Testimony of Lewis T. Bullock.)

The Court: Suppose you tell us, if you will, the differentiation between the two.

The Witness: Angina pectoris is a condition due to narrowing of the coronary artery. The artery——

The Court: Pinching off of the blood supply to the muscle of the heart, is that it?

The Witness: Yes. Let's say the coronary arteries come off above the heart and run over the surface of the heart and transmit blood to the heart muscle. They are particularly subject to hardening or thickening of their lining, so that the inner opening narrows down and becomes very small. The artery becomes rigid and hard.

Now, the normal artery when the patient exercises is flexible and will increase and the flow of blood will considerably increase, so that the heart gets enough blood not only to carry on at rest but also at exercise.

Now, however, if this process of hardening and narrowing of the opening has occurred and that patient may be perfectly comfortable and have no symptoms, but if that patient exercises and the need for oxygen in the heart muscle increases, the opening is rigid and cannot change and so the heart then suffers from a relative lack of oxygen and pain develops [180] during the exercise, which is promptly relieved by just stopping and standing still. And it goes away. And that attack may last a few minutes, five minutes or 10 minutes. It may come back whenever he exercises again, or if he gets excited or anything that increases the need on

estimony of Lewis T. Bullock.)

e part of that heart for any further blood. And at process of pain, intermittent, going on for a ng period of time, may occur over a period of ars, several years. That is not associated with ortness of breath, because the pain starts, and can't exercise enough to get short of breath. As on as he starts exercising this crushing pain starts d he stops with the pain. There is no fever asso- ated with it. It's a temporary, primary pain lled angina pectoris.

Now, that same artery which has been narrowed o has its opening, its lining roughened. That ner lining is then particularly subject to the de- lopment of a clot or thrombosis. Then when that ot starts to develop it develops rather suddenly, thin a few minutes, a short while, and completely ugs up that artery, blocks it. That is called cor- ary thrombosis. That is an actual obstruction of e artery.

Now, that is a much more serious, much more vere, much more dangerous problem. That is what called the severe heart attack, what people refer . The result depends on how large an artery is ugged up; how much muscle [181] was supplied that artery. Assuming that it is a moderate- zed artery and a fair portion of the heart muscle supplied by it, that person is suddenly hit with extremely severe crushing pain; he becomes very ort of breath; often becomes blue and may die if is big enough, just drop dead like that. There is me fever following that as that muscle is de-

(Testimony of Lewis T. Bullock.)

stroyed, assuming that it is not too large and the patient does not die immediately, the patient is then put in the hospital and the shortness of breath lasts for hours or days. He is usually then put under oxygen. The fever will come up within the next two or three days after the attack of severe pain. The electrocardiogram will show characteristic changes, which I am sure we will discuss later, showing the development of actual destruction of muscle. The muscle supplied by that artery is completely deprived of blood. It has no more blood. It is going on moving. It actually dies and is destroyed just as effectively as if you would put a red hot iron on it. It is killed.

Over a period of weeks and months that dead muscle is then slowly, gradually absorbed by the blood, replaced by scar tissue, and in time, after six weeks, that damaged muscle may be completely replaced by scar tissue. That patient may then get up and go about and return to relatively normal activity.

The symptom of prolonged pain, shortness of breath, of [182] fever, all of that is typical of obstruction, but is not typical of temporary spasm or temporary relative lack of oxygen which occurs in angina.

Q. (By Mr. Margolis): Doctor, I may have put my question to you a little inaccurately, and I want to give you a statement and ask you whether this is a correct statement with respect to angina pectoris.

Testimony of Lewis T. Bullock.)

"With the pain there comes a sensation of inability to breathe. The patient describes this as shortness of breath; but there is no panting, no true dyspnea; it's rather as though the breathing had become arrested and it were impossible to draw air into the lungs. The sensation of suffocation or inability to breathe may be the sole symptom."

Now, is this a correct statement with respect to angina pectoris?

A. All I can say is that I have never seen a patient in the thousands that I have seen who was proven to have angina, whose only symptom was difficulty in breathing, without the pain.

Q. Have you seen them where that was one of their symptoms?

A. It might be possible for some people to talk about breathing, but I would emphasize the statement that there is no real shortness of breath, no real dyspnea.

Q. But the patient describes is as that, and the reason [183] he describes it as that is because that is his reaction to it, isn't that so, Doctor?

A. Under very rare and unusual conditions it might be so.

Q. Doctor, do you rely at all upon any authorities for that statement? Do you know of a single authority that backs that up, outside of your own experience?

A. It's the generally held opinion, I would say.

Q. Can you give me the names of any books or

(Testimony of Lewis T. Bullock.)

writers who say that the sensation of inability to breathe is not common in angina pectoris?

A. I would say that. I told you before that I based my opinion upon the observations of many thousands of patients and not upon what somebody else said.

The Court: Have you expressed it as your opinion, Doctor, that the sensation in the patient of shortness of breath or inability to get their breath, as a layman would say, is not a symptom of angina?

The Witness: It would be extremely unlikely. They complain of pain; just a pain. The name of the disease itself "angina," means pain. And that is far outstanding.

Now, in medicine it is always difficult to say that nothing cannot happen. But when it might occur one in a thousand or five thousand patients, one looks upon it with a considerable degree of skepticism and says, "Well, it might [184] occur," but one would look very hard to find some explanation of that. It's not what normally occurs in many, many patients with this problem. Dysnea is not the symptom. The symptom is pain.

Q. (By Mr. Margolis): Well, I am not talking about just something that happens in an isolated case, one in ten thousand times. I suppose almost anything could happen once in ten thousand times. But I am talking about this as a typical symptom. You have done a great deal of studying in the field, haven't you, Doctor? You have read a great many books? A. Yes, I have.

'estimony of Lewis T. Bullock.)

Q. Can you recall a single authority that agrees th you, with your experience, that this is not a pical symptom?

A. I did not look that up particularly, since I ought my position here was to give you the bene- of my experience rather than quote books for u. I can get books if you want me to.

The Court: Doctor, if the patient had this pain hich Mr. Margolis described to you, and accom- nied by a sensation of suffocation or shortness breath, would it be your diagnosis that he had me heart trouble of some kind, a heart attack of me kind, as the layman puts it?

The Witness: If he had the pain.

The Court: If he had the pain which has been scribed to you, plus the sensation of suffocation.

The Witness: If the patient had the pain which as described, of a severe, crushing, precordial in, radiating from there to the arm, and was also ort of breath, I would think he had the clot, the ronary thrombosis.

The Court: Rather than angina.

The Witness: Yes.

The Court: And if this pain radiated into the ft arm, down as far as the left wrist, and did not ter the right arm at all, would your diagnosis be e same?

The Witness: That would be quite characteristic coronary thrombosis.

The Court: Rather than angina.

The Witness: The dysnea would make me—as

(Testimony of Lewis T. Bullock.)

soon as they start having shortness of breath, you think there is actual shortness of heart muscles and a clot, rather than simple spasm.

The Court: And sometimes those attacks, two or three follow each other, is that right?

The Witness: You may have one, two or maybe three; usually not more than two. They may occur within a week.

The Court: Week or two?

The Witness: Part of the same general set-up. In other words, that clot may spread a little bit. It may start in a small artery and may spread a little bit. So you may have a recurrence of the major attack. [186]

The Court: You may have a major attack and then two minor ones?

The Witness: Usually not two. You may have one additional one. Actually, you usually have the minor one when it is in the small artery, and then a few days later the major one comes into play. But my position is the shortness of breath makes me think it is coronary thrombosis rather than angina. And I think we are debating about the use of terms.

Q. (By Mr. Margolis): In any event, it is a typical feeling of a person having some sort of heart trouble?

A. Of a typical type of heart trouble. It is characteristic of coronary thrombosis.

Q. Now, it is true, also, is it not, Doctor, that not every heart attack—not even every coronary thrombosis is accompanied by alteratons in the elec-

stimony of Lewis T. Bullock.)

cardiogram? A. That is correct, yes.

). So that actually in diagnosing a heart con-ion, actually history is the most important single tor, isn't it, Doctor?

. Well, no. One has to consider every bit of ormation you can get. And I don't think one ld say anything is more important than the er.

). In any event one couldn't pick up an elec-cardiogram and say the electrocardiogram is npletely normal, 100 per cent normal, and there-e I know he doesn't have a [187] coronary throm-is. A. That's right.

). Or angina pectoris. One could not say that?

. No, sir.

). And also, it is true, is it not, Doctor, that re are areas of the heart where the electrocardio-m is far less effective than other areas with re-ct to revealing the nature of the damage?

. That is correct.

). So that if it is up around the back and high, would expect probably less results on your trocardiogram than if it was down low enough front where your electrocardiogram could get the sations rather fully, is that correct?

. That is correct.

). So that actually you have to look at all varia-ns in the electrocardiogram, all variations from norm in the electrocardiogram and consider m in the light of the history of the patient.

. That is correct.

(Testimony of Lewis T. Bullock.)

Q. And sometimes the fact that the deviations from the norm in the electrocardiogram are what might fall within normal limits, what might in some cases be indicative of nothing because there were no accompanying symptoms or no accompanying history, would, with a certain kind of history [188] and certain symptoms, be indicative of some sort of heart trouble, isn't that right, Doctor?

A. Yes. You could have a perfectly normal electrocardiogram and the patient still have had in the past a heart attack. And, also, the timing is a factor there. In other words, the closer you get to it the more likely it is to show. And it is quite possible that the electrocardiogram would show evidence of the attack at one time and it might not show later on.

Q. It might show it within a couple of days of the attack, and might not show it two months later?

A. Well, it is usually several months later. But it is possible for the evidence, for the signs to go away.

The Court: After a coronary thrombosis, Doctor, how long does it take for the repair, as a rule, to take place; the repair in the muscle that you describe?

The Witness: About six weeks. And so it is standard treatment to keep the person in complete bed rest for six weeks.

Now, it is not possibly completely repaired and they are kept off of normal activity for three months. And the electrocardiographic changes will

estimony of Lewis T. Bullock.)
w the scar. And so that is often permanent. And
ne changes usually show for a much longer pe-
d of time. We have to distinguish between the
lacement by scar and the return of the electro-
diogram [189] to normal, which actually usually
sn't occur. I just state that it might occur and
to be considered in evaluating a problem of this
.

. (By Mr. Margolis): There are some kinds
heart attacks that will disable a person from
mal activity for the rest of his life, aren't there,
tor? A. Yes.

. Now, Doctor, one of the things that you
ld expect in a normal electrocardiogram would
hat if there were slight deviations from 100 per
t——

Ir. Margolis: I want to withdraw the question
rephrase it.

. (By Mr. Margolis): One of the things that
would expect in an electrocardiogram of a nor-
person as far as his heart is concerned would
hat even though there were deviations from 100
cent norm in the tracings, those deviations
ld be pretty consistent, isn't that right, Doctor?
n other words, you would take a half dozen
G's over a period of time and you would expect
ind pretty much the same deviations at all times
that person that does not have a heart condi-
n.

. No. Some are and some are not. It would

(Testimony of Lewis T. Bullock.)

vary depending upon which ones you are talking about.

Q. Isn't it particularly true with respect to the [190] T-Wave and the S-T Segment?

A. Well, one thing I think for instance that will affect it and cause it to change from one minute to the next is a change in position of breathing, the change in position of the heart. You can have changes from one minute to the next very rapidly.

Q. So that if a doctor when he takes the electrocardiogram takes it in various positions, and yet on the basis of the comparison of positions the changes remain constant, then he can be sure, can he not, or reasonably sure as a doctor can be, that the changes in the electrocardiogram are not due to changes in position?

A. Within a given set of changes, I could tell you whether that is within the normal variations or not.

I must emphasize that one must be acutely aware of the normal changes that do occur from day to day, depending upon the alkaline status of the blood, type of respiration, position of the heart and many other things. So I am not quite sure what variations you refer to. If I could see them on the record I could tell you whether they are normal variations or not.

Q. You wouldn't expect the T-Wave on one electrocardiogram, say in Lead 3, to be isoelectric—that's level one time, inverted another time and extending upward another time, would you? [191]

(Testimony of Lewis T. Bullock.)

A. I wouldn't be at all surprised. I can show you many records from one minute to the next you can change that by just by changing the state of respiration. And unless you can standardize the exact position of respiration, how deep the breath is, you can change it instantly. You can just change it back and forth every five minutes; particularly in Lead 3. And I can tell you why.

Q. Assume the same position, Doctor, and the checking of this in various positions; and also assume that the electrocardiogram is taken with a breath taken in the middle on Lead 3. That is the common way of taking it, isn't it, Doctor, so that you can judge? That is a factor?

Assume those things, and still assuming that with those precautions taken you still find these changes in the T-Wave, would that be at least a pretty suspicious circumstance, Doctor?

A. It would determine upon the degree of the type, and circumstances. One approaches T-Wave changes in Lead 3 with a great deal of skepticism because they are normally inverted in a large proportion of people. The T-Wave, you pay very little attention to it in Lead 3 because it normally varies up and down.

Q. Doctor, is that as far as you know, or are you relying again entirely on your own experience or are you relying on authorities? Can you give me any authorities to [192] support that proposition, Doctor?

A. I rely upon the same experience.

(Testimony of Lewis T. Bullock.)

Q. Just your own experience?

A. And the fact that I have read many, many books and——

Q. All right. I won't bother you any more about it.

A. ——have been in conferences with many, many of the experts in the country and it is my concept that that is the generally held opinion.

Q. But you can't give me anything specific?

A. No.

Q. You wouldn't care to cite any authority that you would consider that you would be willing to accept on that proposition?

A. I quote Dr. Bullock.

Q. Who? A. Dr. Bullock.

Q. Dr. Bullock. All right. That is who we have here. Have you written any books on this subject?

A. No.

Q. Now, it is also true, is it not, Doctor, that nitroglycerin relieves the pain of heart attacks. It sometimes tends to eliminate it altogether and sometimes just relieves it, is that true?

A. Of angina. Not of coronary thrombosis.

Q. All right. Of angina. Does it give any relief for [193] coronary thrombosis?

A. For practical purposes, no.

Q. All right. Now, if nitroglycerin is used by a patient and it gives him relief when he has these pains, isn't that itself a diagnostic measure, Doctor?

A. It is one of the points in a diagnosis that carries some weight.

(Testimony of Lewis T. Bullock.)

The Court: Doctor, from the symptoms you described would you expect or would you be surprised that the same person might have both. That is, he might suffer from angina and also have a coronary?

The Witness: The person who has had a coronary thrombosis in the past not infrequently has angina subsequent to that. And, of course, as I described it, a person who has angina is the one who is likely to get a coronary thrombosis. But in treatment and handling and symptoms one very carefully distinguishes between the two, because a coronary you put right to bed. In angina you let him go continue to walk around and continue to work.

The Court: But if a victim of coronary thrombosis shows symptoms of angina you might prescribe for him some nitroglycerin?

The Witness: Oh, yes. A patient with one—angina may go into coronary thrombosis and coronary thrombosis may be followed by angina, and the angina would then be treated [194] by nitroglycerin; and nitroglycerin, characteristically, relieves the pain of angina, although it relieves quite a number of other pains, too. That is not the only one it relieves by any means.

The Court: It achieves this relief by relaxing the muscles, does it, or relaxing the arteries?

The Witness: Well, sir, theoretically it achieves this relief by dilating the coronary artery; and it does that despite the fact that I have just previously said that that artery is so rigid and hard it won't dilate very much. So there is a little incon-

(Testimony of Lewis T. Bullock.)

sistency in our knowledge of the subject. We know it does. And somewhere or other there seems to be spasm in the artery in addition to the narrowing that causes the angina and it relieves the spasm of the artery and opens it up and lets more blood flow through it. It will relieve the spasm of any voluntary muscle. For instance, a gallstone attack is also helped by nitroglycerin because it relaxes the spasm around the stone.

Mr. Margolis: Also kidney stones, as I can personally vouch for.

Q. (By Mr. Margolis): Now, you said that when a person has angina pectoris you don't necessarily put them to bed like a person with a thrombosis.

A. No.

Q. However, the point is, it is a fact, is it not that [195] a person who has angina pectoris will have, ordinarily, a limit to the activity in which he can engage without pain? A. Yes.

Q. For example, he may be able to walk two blocks on the level without pain or one block or five blocks or he may be able to walk on the level and not walk upstairs. Or he may be able to do ordinary work which doesn't require lifting and may not be able to do lifting. There are variations, isn't that right? A. Yes.

Q. And proper treatment of angina pectoris is to keep the activity below the level of pain.

A. That is correct. That is part of it.

Q. If it hurts him to walk one block he shouldn't walk one block.

Testimony of Lewis T. Bullock.)

A. At a given rate. It is more a matter of speed t which he walks that block.

Q. Yes. Or I mean—let us say if it hurts him to alk up a flight of stairs he shouldn't walk up that ight of stairs. A. That is correct.

Q. And if it hurts him to engage in a certain ctivity it is harmful for him to engage in that ctivity. A. Yes.

Mr. Margolis: I would like now, if your Honor lease, to [196] have a look at the doctor's records, I may.

The Court: Very well. We will take the afternoon recess for five minutes.

(Short recess.)

Mr. Sikes: May I address the court for one second, sir?

The Court: You may.

Mr. Sikes: I have in my hand Exhibit C-1 and Exhibit C-2, which are Dr. Bullock's photostatic opies and his yellow office copies, and I have in he meantime found in my file the originals thereof, nd I would like to substitute the original for the opies. And he can retain his office copy.

The Court: Is there any objection?

Mr. Margolis: No objection.

The Court: You may hand the originals to the lerk and withdraw all copies.

Mr. Sikes: All right, sir. Thank you. And I assume they may carry the same identification exhibit umber.

(Testimony of Lewis T. Bullock.)

The Court: They will be merely substituted fo the copies in evidence.

Mr. Sikes: Yes, sir.

The Court: Gentlemen, I won't be able to hea this case tomorrow afternoon. If we don't finish b tomorrow noon I don't know when we will finis I have to be in Santa Barbara all next week an Washington the week after that. I don't know whe we will have an opportunity to finish it. [197]

Mr. Sikes: The State of Washington, sir, or—

The Court: Washington, D.C.

Mr. Margolis: I don't see how it could be pos sible, because we were hoping that we could finis by tomorrow night.

The Court: We can sit until 6:00 o'clock today

Mr. Sikes: I unfortunately am taking depos tions each night.

The Court: You postpone your depositions, Mr Sikes, and we will finish this case. I don't think i is possible to finish it—we should finish by tomor row noon if we sit late this evening.

Mr. Margolis: I am certainly willing to do i your Honor. And I will try to hurry up and mov along a little faster then. I will cut out some o my cross examination. I will cut it short.

May I proceed, your Honor?

The Court: You may.

Q. (By Mr. Margolis): Dr. Bullock, when Mr Vitco came into your office you took a report fro him, did you not? A. Yes.

Q. You took a history from him? A. Yes

(Testimony of Lewis T. Bullock.)

Q. And upon the basis of that history, accepting it as true, you concluded that he probably had a coronary [198] thrombosis while on a fishing boat in January 1952, is that right?

A. Assuming the accuracy of the history, and assuming the lack of other evidence not available to me at that time, I came to that tentative conclusion with stated reservations and questions.

Q. However, the only additional evidence that you didn't have before you that you could have had was an electrocardiogram taken at or about the time of the accident, assuming his statement to be true. In other words, your diagnosis was based upon an assumption of the truth of his statements, isn't that right? A. That's right.

Q. Now, let us from here on just assume them to be true for the purpose of the questions that I am going to ask you. Put that to one side.

The only additional evidence that you did not have, that you referred to in your report, was an electrocardiogram taken at or shortly after the time of the alleged attack?

A. And some more reliable observations concerning the findings on the patient at the time.

Q. Well, what do you mean by somebody—it is a question of the truth of his statements? Is that what you are talking about?

A. No. Of the actual physical findings. [199]

Q. Well, isn't it a fact that, accepting his description as reasonable and reliable, there were no findings which would preclude that being a coro-

(Testimony of Lewis T. Bullock.)

nary thrombosis, is that right?

A. No findings when I examined him?

Q. Yes.

A. No. I had no way to exclude coronary thrombosis.

Q. And even if an electrocardiogram had been taken the day after the accident, the day after the occurrence, and it had been negative, that would not have meant there was no coronary thrombosis. That is right, too, isn't it?

A. That is correct.

Q. Now, it is true, is it not, that although you found that there were some discrepancies between his history as he gave it to you and the telegrams —that is, the messages from the Coast Guard which are in here as Exhibit 2, the ones we referred to— you found those discrepancies not to be of major importance in arriving at your diagnosis, isn't that correct?

A. Well, the diagnosis was based entirely upon the acceptance of his story as being reliable, irrespective of everything else; and the report so clearly states.

Q. Doesn't the report also say, "There is some discrepancy between the story—" and I think that is Mr. Viteo's story— "and messages recorded by the Coast Guard, although [200] these are not of major importance."

Doesn't it also state that, Doctor?

A. I believe so.

Q. And that was your opinion then and it is

(Testimony of Lewis T. Bullock.)

your opinion now, isn't that correct? Or have you changed your opinion?

A. It has to be interpreted in connection with everything else. Alone, one could not—taking that alone you could not change the general conclusion on the basis of that alone.

Q. And it was your opinion then that the differences between his story—just this one point—the differences between the history as he gave it and the messages, these radio messages, was not of major importance in your diagnosis?

A. I chose to rely upon his statement in reaching that conclusion; and, therefore, reached the conclusion.

Q. Well, Doctor, that is not my question. My question is that you also considered the differences between his story to you and the statements as they appeared in those messages as not being of major importance. A. Not alone.

Q. Well, let me—just to clear this one thing up, let me see if we can get the exact words of your report. Isn't it true that you said, "There is some discrepancy between the story—" you are referring there to Vitco's story, aren't you?

"——and the messages recorded by the Coast Guard, although [201] these are not of major importance." A. Not alone.

Q. Does it say "not alone," Doctor?

A. No.

Q. That is all it says, that "these are not of major importance"?

(Testimony of Lewis T. Bullock.)

A. But it does not say that put together with other things it wouldn't add up to something of importance. It points out there are discrepancies there.

Q. In other words, you found in the messages themselves information which generally tended to confirm your opinion that Mr. Viteo had a heart attack, or had a coronary thrombosis at the time on the boat, isn't that right?

A. No, sir. The messages were inconsistent with it, and there were major problems in the messages that didn't go along with this story.

Q. What did you mean when you said, "the differences are not of major importance," Doctor?

A. The fact that one could not take that alone. It would be possible for those things in there that are inconsistent with his story to have been the result of confusion. However, when you start adding a number of different things together, it becomes a matter of very great importance.

Q. In other words, when you said, "the differences are not of major importance," what you meant was that they were [202] important but they could have been the subject of confusion. Is that what you meant to say? A. That's right.

Q. You didn't mean to say they were not important?

A. What I meant was that they alone were not—although they were inconsistent, and I was pointing that out, here is something that is not right

(Testimony of Lewis T. Bullock.)

but that is not enough still to make me—one has to choose either one story or the other.

Mr. Margolis: I have no further questions.

Mr. Sikes: May I have a few questions?

The Court: You may.

Redirect Examination

Q. (By Mr. Sikes): Doctor, what are the physical factors in connection with the taking of an electrocardiogram which can affect from moment to moment or minute to minute this T-Wave?

A. Oh, the most important thing is the position of the diaphragm. And that is particularly true in Lead 3. Lead 3 records the lower part of the heart, and that is resting right on the diaphragm. So the heart moves up and down with each change, each breath. And so by just breathing in it changes it. The fact that that is true is the reason why very frequently Lead 3 is taken both in inspiration and expiration because it is known to change so much. And by doing that routinely you get a record of the changes that [203] take place. However, the changes are so great that the T-Wave in Lead 3 is in general not of any great diagnostic significance.

Q. Does nitroglycerin relieve the pain of a coronary thrombosis?

A. Not to any extent, no. That pain is too severe. It cannot relieve an obstruction. It may relieve a spasm.

Q. And did you state that as far as angina pec-

(Testimony of Lewis T. Bullock.)

toris is concerned that normally there is no feve
no shortness of breath? A. That is correct

Mr. Sikes: That is all.

Mr. Margolis: No further questions.

The Court: Doctor, if you have in mind you
examination of this libelant here, if you were calle
upon to examine him and found him down fishin
aboard a fishing vessel along the western coast
Mexico suffering from pharyngo-esophagitis, wou
you recommend that he be sent home? Would
leave the ship and fly home?

I should also say to you that he is the cook.

The Witness: Well, one would be faced wi
conflicting interests. However, one of the maj
ones is that he is a contagious person and mig
very well transmit this infection to the other peop
in the crew, when you would not only have the coo
sick but everybody else sick. And for that reas
someone [204] responsible for the illness of seame
would in general tend to lean towards protectin
the spread of a contagious disease.

Also, if he had something severe enough to pr
duce as much trouble as was produced by this on
one thinks about abscesses, something that needs
surgical approach, and, therefore, would need mo
than just penicillin. If one had an infection
that sort that had to be treated with fair doses
the antibiotics, but then was not responding, the
one feels, well, now, we need a nose and throat ma
to examine this more thoroughly to see if drainag
is complete, or something more can be done. An

Testimony of Lewis T. Bullock.)

or both of those reasons one might very well recommend that he get into the hands of a nose and throat specialist.

The Court: Any further questions?

Mr. Margolis: No, your Honor.

Mr. Sikes: No, your Honor. Thank you, Doctor. May the doctor be excused, sir?

Mr. Margolis: Yes. No objection.

The Court: You may be excused, Dr. Bullock.

(Witness excused.)

The Court: Do you wish the libelant to resume the stand?

Mr. Margolis: Yes, your Honor. And I am prepared to go ahead. * * * * * [205]

ANTHONY VITCO

the libelant herein, having been previously sworn, resumed the stand and testified further as follows:

Direct Examination—(Continued)

Q. (By Mr. Margolis): I think, Mr. Vitco, we had come in your testimony to a point where you had returned home. A. Yes, sir.

Q. About February 1st of 1952.

Now, when you returned home did you——

Mr. Margolis: In order to move along I may read a little bit, and if counsel objects I will stop immediately—on some things which I think are not critical.

The Court: Well, there is a great field there, I suppose, where there is no dispute at all.

Mr. Margolis: Yes.

(Testimony of Anthony Vitco.)

Q. (By Mr. Margolis): You went home in cab from the airport, is that right?

A. That's right.

Q. And then you went to bed?

A. That's right.

Q. Now, the next day—or, did you have a co versation with Mr. Joncich?

A. That's right.

Q. Now, is this the same Mr. Joncich who h hired you? [206] A. That's correct.

Q. And he had not gone on the trip on the bo and he is the Mr. Joncich who is one of the r spondents? A. That's right.

Q. Now, where was that conversation with hir Where did you talk to him? At your home?

A. When I came back?

Q. When you came back.

A. Yes, sir, my house. He came over to r house.

Q. And that was the morning of the day aft you came back? A. That's right, sir.

Q. And who was present besides yourself a Mr. Joncich, if anybody?

A. Well, my missus was home. My wife w home.

Q. Was she there during the conversation?

A. I believe so, sir.

Q. Now, will you tell us what was said, on with respect to the question of medical care, if y will? Getting to the doctor.

A. Well, we asked for a doctor. I told him

(Testimony of Anthony Vitco.)

vould like to go to a Navy—health department vhich we belong to when we fish. Mr. Joncich says hat he got one of his own doctors which he thought vas one of the best that he ever try. He say he pent lot of money with other doctors and this [207] s one that he is pretty sure that is going to help ne. And I went with him to his doctor.

Q. Was the doctor's name Dr. Ulrich?

A. Yes, sir, that is correct.

Q. And he was a chiropractor, not a medical loctor?

A. Not a medical doctor, no, sir.

Q. And you went to him beginning early in February, is that right?

A. Something like that, sir, as soon as I got back rom the ship.

Q. And for how long a period of time did you ontinue to go to this doctor?

A. Well, sir, I—only a few days. I figure—well, tell you what I did. I pay him $125, I believe, and t is $3 a call, and the first call is $10.

Q. And the total amount that you paid him was 3125?

A. $133, $135, something like that. I must have vent a little bit more than a month. It isn't every lay. Mr. Joncich used to take me. And then my vife drove me. A couple of times a week we used o go.

Q. What did he do for you?

A. Well, he sent me down and he put something on my chest, on my knee, on my head—little thin—

(Testimony of Anthony Vitco.)

just like small piece, and they are hooked on el tricity, and there's a radio or something in the ba It doesn't feel hot or [208] cold—nothing. Just do feel nothing.

Q. And he gave you those treatments every ti you came? A. That is right, sir.

Q. And how did you feel during the time t you were going to him?

A. Well, I felt worse every day, sir.

Q. The treatments didn't help you?

A. No.

Q. Will you tell us during this period of ti what it was that was bothering you? For examp I want to know whether you felt better when y were sitting down or when you were walking just how you felt and when and if you had pai where they were.

A. Well, the pains were in the chest, in arm,——

Q. Which arm? A. The left one.

Q. Now, did the pain ever go into the rig arm?

A. Very, very seldom. Once in a while it did me in the right arm. Very seldom. The worst o was the left, sir.

Q. And whereabouts in the left arm was it?

A. It came down here to my wrist here (i dicating); down, oh, well, this muscles inside, believe. And it came down to my wrist here (i dicating).

Q. Now, at any time while you were going

(Testimony of Anthony Vitco.)

Dr. Ulrich [209] did he give you any kind of pill or anything like that?

A. He gave me only one pill, sir, just about a few days before he told me not to come back no more.

Q. And you say he gave you one pill?

A. He gave me one pill and says, "You take this home and try it tonight. Put it under your tongue. And come back in three days and let me know what that pill did to you."

Q. And did you do that?

A. Yes, sir, I did.

Q. And what happened when you took that pill?

A. Well, it relieves my pain in the chest.

Q. Did it take it away altogether?

A. It helped me a great deal. It did help me.

Q. All right. Now, did the doctor tell you what was in that pill?

A. Yes. When I come back—he didn't tell me, but he told one of his doctors.

Q. In your presence?

A. Yes, sir. "I told you," he says. He says, "I told you." But he said in a medical—I couldn't understand "I told you that pill will tell us what is wrong with the man."

Then he told me, "Mr. Vitco, you don't have to come over any more. But I got a friend of mine, a doctor, he is not a specialist or anything, but I want you to go to him so he [210] can prescribe this kind of—let him examine you. I am pretty sure he can give you some pills that will help you when

(Testimony of Anthony Vitco.)

you get this pain." And that's what happened. I went to his doctor friend twice. It was on Vermon Avenue near here. And he examined me. He's both a chiopractor and a medical. And he gave me a prescription and then I bought those little pills an I have been using using them ever since.

Q. Those are the nitroglycerin pills, is tha right?

A. Yes, sir, the same white ones.

Q. And have they given you relief when yo have used them?

A. Yes, sir. I took one a little while ago. It help me, but then not for a long time, but it helps m a little time.

Q. Now, did you ever go to the U. S. Publi Health Service after you came back?

A. Well, no, sir—you mean after I——

Q. After you came back from the trip, you know after you came back on the plane.

A. Oh, yes, I went once.

Q. Did they examine you there?

A. Yes, they did.

Q. Were you told there what was wrong wit you?

A. Yes. The doctor told me what was wron with me.

Q. What did he tell you? [211]

Mr. Sikes: I am going to object to that on th grounds it is hearsay.

Mr. Margolis: I think it is admissible for th following reasons, your Honor: No. 1, it's the basi

(Testimony of Anthony Vitco.)

for other questions. There are two reasons. It has been alleged as a defense here——

The Court: First, let me ask you for what purpose you offer it. Do you offer it to prove the truth——

Mr. Margolis: No, no. I offer it for the purpose of showing he was told.

The Court: Just the oral fact.

Mr. Margolis: Yes, the oral fact that he was told, yes, your Honor.

Mr. Sikes: Then I object to it on the grounds of immateriality.

Mr. Margolis: The law is that a man, and I will cite authorities if your Honor wants them on this point, that a man has a right to rely on a diagnosis that is given by the doctor and act accordingly, even if that diagnosis happens to be wrong; and is entitled in reliance on that, if he doesn't work following that, to get maintenance. In other words, regardless of the truth of it.

The Court: In other words, it is relevant to the issue of whether or not he was fit for work, is that it?

Mr. Margolis: That's right.

The Court: Or considered himself fit for work.

Mr. Margolis: That's right. Even though the doctor's—I am not saying that the doctor's diagnosis was wrong, your Honor, but I am not offering it for the truth of the doctor's diagnosis. But I am offering it—and I want to confirm it merely to show what was said by a report from them, merely for

(Testimony of Anthony Viteo.)

the purpose that this is what he was told; this wa the diagnosis which they transmitted to him, with out regard to whether it was right or wrong.

The Court: Is there any issue as to when h was fit for work? Or is it agreed that he was no and has never been since?

Mr. Sikes: Pardon me just a second. I am tryin to think over the evidence.

The only evidence that there has been so far i that he was not fit for work, I believe. Therefor what he was told by the United States Public Healt is immaterial in view of the evidence that ha come in so far. The only evidence at all was tha he was unfit to work.

The Court: The question is not what the evi dence is, is it? The question is, what are the issue If the respondents stipulate or agree that he ha never been able to work since, that is one matte

Mr. Sikes: In view of the state court case com ing up, I cannot stipulate as to that.

The Court: Very well. The objection is over ruled. [213]

Mr. Margolis: Was there an answer to the ques tion?

Well, I will repeat the question. I think it will b quicker, your Honor. It is a compound question, bu I think it is proper.

Q. (By Mr. Margolis): What did the doctor te you was wrong with you and what did he tell yo to do?

(Testimony of Anthony Vitco.)

A. You want me to tell you, sir, every word he says to me?

Q. Tell me what you remember about what he told you.

A. He told me I got a heart condition; and, you know, like every patient likes to know, your Honor,——

The Court: You just tell us what he said.

The Witness: And I says, "What kind of a heart condition do I have?"

He says, "What's the difference?" He says, "You got a heart condition. You go home and go to bed, and don't get up except to the bathroom. Tell your mother to bring you food on the bed."

Then, I says—you know, the Navy, you can't talk much to them—I said, "Well, will I be able to do any work?"

He says, "Sit down." He says, "My father had the same trouble you did, but he was a newspaper man. Don't work." He says, "Go to bed and stay——"

Q. (By Mr. Margolis): Well, I think we can save time without going into the story. Just what he told you to do, [214] and not every word of it, every word of the conversation.

A. All right. He told me, "You go home and go to bed. You got family?"

And I say, "Yes."

He said, "You go home and go to bed and lay down and stay in bed for a couple of months." Then he says, "See how you feel. Take it easy." And

(Testimony of Anthony Vitco.)

that's all. He told me about his father having th same trouble.

Q. Did he say anything to you about the nitr glycerine? A. Yes.

Q. What did he say?

A. Well, he says to put under tongue any tim I got pain, put them under the tongue, like thos other doctors—the same thing.

Q. Now, after you stopped going to Dr. Ulric —well, did you start shortly thereafter?

A. May I please ask you this: After I ask hi what kind of trouble I had, but I don't know wha that mean then, he says, "Angina pectoris." But don't know. He says, "You got angina pectoris an two different conditions." And then he make m sit down.

Q. Did he say anything else besides that?

A. He say two different heart conditions. I don know. He took that—what you call it?

Q. An EKG? [215]

A. That's right.

Q. Now, after you stopped going to Dr. Ulric did you then go to Dr. Abowitz, Murray Abowitz

A. I tell you what I did, sir. I try to go to th Navy again, but—I guess must have been that tim —but I get in—after two months I couldn't get i any more.

Q. They wouldn't treat you?

A. No. They say, "After two months you ca fish." But I was sick. Then I went to Dr. Abowit

Q. Now, you went, I believe the first date, a

(Testimony of Anthony Vitco.)

cording to Dr. Abowitz' records, March 27, 1952. Would that be about right?

A. Just about right, sir, yes.

Q. Now, when you went to Dr. Abowitz how were you feeling as compared to when you had come in on the airplane from Mexico?

A. I was feeling, Mr. Margolis, bad, very bad. My wife have to put shoes and every clothes on me. I couldn't do anything. After I got to Dr. Abowitz he started to give me some treatments, some shots, took the cardiograph. He told my wife I had heart trouble. He told me, "Don't move. Take it easy." And, oh, after a couple of months I start to feel gradually a little bit better. I was able to dress myself, sir.

Q. Did he give you various kinds of medicine?

A. Yes. I got lot of bottles that he gave me.

Q. Did he continue to give you nitroglycerin?

A. But I use most—with all the other medicines, I have been using this nitro. That seems to help me more than any other medicine.

Q. You continued to go fairly regularly to Dr. Abowitz until sometime in December of 1953?

A. Pretty regularly, sir, yes.

Q. And then you didn't go to see Dr. Abowitz for, oh, many months, nine or ten months, or something like that, is that right? A. Yes, sir.

Q. By the way, how had you been getting to see Dr. Abowitz?

A. Mr. Vitco and my wife were driving me. She went with me.

(Testimony of Anthony Vitco.)

Q. By the end of 1953, were you driving a ca
by that time?

A. Oh, yes, sir. I could drive if it wasn't to
much of traffic where I couldn't get—then if I g
pain I pull up to the curb and take a little pill an
stay for about five minutes and go on again. Bu
I didn't trust myself to drive much.

Q. Did you feel capable of driving yourself t
Dr. Abowitz? [217]

A. Alone? No, sir. I was afraid to take
chance.

Q. Dr. Abowitz' office is on Wilshire Boulevar
and you were living in San Pedro?

A. Yes. Pretty traffic—I was afraid to take
chance.

Q. Did anything happen in December of 195
so far as your wife being able to bring you to D
Abowitz' was concerned?

A. Well, most of our savings—in fact, all of
went, and you know, pretty hard to live like tha
And she went to work in a cannery.

Q. She never worked before, is that right?

A. Never. I never thought she would have t
But she went to work in a cannery. Then I couldn
just go alone. I had nobody to take me over or pa
anybody. Nobody to pay them. I couldn't go alon
But I called him on the phone, sir.

Q. Did you keep in touch with him?

A. Yes, sir.

Q. You used the telephone?

A. I remember—yes. I called him sometime eve

(Testimony of Anthony Vitco.)

twice a day when I had those, you know, kind of like today—bad.

Mr. Margolis: I think, your Honor, we ought to take a recess.

The Witness: I am pretty tired. A little bit more? [218] Can I go a little bit more? A little bit more?

Mr. Margolis: All right.

The Court: You let us know when you have had enough.

The Witness: That thing checks me. Yesterday I was all right. Today I am no good.

Q. (By Mr. Margolis): Did you keep gradually getting better after you went to Dr. Abowitz, or after a couple of months did you sort of level off and stay the same?

A. No. I don't understand that one. Tell me again, please.

Q. All right. You have already told us that Dr. Abowitz' treatment and the things that you did after you went to Dr. Abowitz made you feel better.

A. Mr. Margolis, I know he can't cure me—nobody can cure me—but God bless him.

Q. Well, that isn't the point.

A. He helped me a lot, sir. He helped me a lot. I dressed myself.

Q. All right. What I am trying to get at is this: For how long did you continue to get better? Are you still getting better?

Mr. Margolis: Well, I will withdraw the last question.

(Testimony of Anthony Viteo.)

Q. (By Mr. Margolis): Are you still getting better?

A. I have been getting better every time I went to him, sir. Every time he helped me. He usually give me a lot [219] of shots, and shots did help me sir, a lot—and other things.

Q. Is your condition still improving, or has it been for some time about the same?

A. Well, no, I can't say that I am getting every day better any more.

Q. About when did you stop getting better?

A. I believe since I didn't have any more much treatment from Mr. Abowitz. I believe since I am not going to the doctor's no more.

Q. Was that the end of 1953 or 1954? When was it in time. Do you remember?

A. Did I stop from Mr. Abowitz? Oh, I don't remember, sir. It must be bill some place. Not very long ago, I guess. I know I went to this other doctor a couple of times after Abowitz. What is his name, that is here today?

Q. Dr. Hittelman? A. Yes, sir.

Q. But can you fix at all—it is now 1955.

A. Yes, sir.

Q. It is now February of 1955. Was it last year that you stopped feeling better? Was it the year before? Was it this year?

A. That I stopped feeling better, you mean?

Q. When you can that your improvement just about stopped. [220]

A. It must be last year.

(Testimony of Anthony Vitco.)

Mr. Sikes: Excuse me. I am going to object to that, your Honor, that last question as it was phrased, obviously calls for a conclusion of the witness as to whether his condition is getting better. The previous question about whether he was feeling better——

Mr. Margolis: I think counsel is right and——

The Court: He has answered the question.

Mr. Sikes: Oh, he has. What did he say, please?

(Answer read.)

Q. (By Mr. Margolis): And when you say it must have been last year, it meant that is when you stopped feeling better? A. That's right.

Mr. Margolis: That is all I am offering it for, obviously, your Honor.

Q. (By Mr. Margolis): About when last year? Can you remember?

A. Be in September, October or something like that. I know it was before Christmas.

Mr. Margolis: I have no further questions on direct.

Oh, about one more—two or three more on work.

Q. (By Mr. Margolis): Have you done any work at all since you returned from Mexico?

A. Well, no, sir, nothing to amount to anything—nothing. [221]

Q. When you say "not to amount to anything," what do you mean? Explain what you have done.

A. Well, I—when Mama was working—she is not working now—I go after groceries and I cook a meal for my family—home—when I can.

(Testimony of Anthony Vitco.)

Q. In other words, you helped around the hous by cooking a little bit, by getting some groceries sometimes—that kind of thing?

A. That's right.

Q. Did you ever work on any kind of a jo since then?

A. No, I couldn't get no job. Even if I asked for it, they don't want to give it to me. I asked one company if they could give me a little work——

Q. Well, have you worked? A. No.

Q. Do you find that your trouble, your difficulty gets worse, your pain gets worse or starts if you do certain things?

A. Well, sir, yes, sir, it does.

Q. Tell us what causes it?

A. Well, if I get little bit sore, you know, some thing, or if I get excited, or if I try to work a little bit—sometimes I drive around my house around the block. Sometimes, if it is on the level I can maybe a couple of blocks, but up in the hil I can't do it. And if it's a little bit windy it hurt me terribly in my chest. [222]

Mr. Margolis: That is all on direct, your Honor

The Court: Do you feel like answering Mr Sikes' questions now, or do you want to quit fo the day?

The Witness: I like to help him finish this.

Mr. Sikes: Oh, no, don't help me——

Mr. Margolis: Well, I think if we could have a few minutes' recess——

The Witness: I got to take one of this pills——

(Testimony of Anthony Vitco.)

Mr. Sikes: If the court please, I obviously don't want to find myself in the position of pushing this man beyond his physical ability.

The Court: We will take a recess, and you gentlemen talk with him.

Mr. Sikes: All right, sir.

The Court: The court will recess for five minutes.

(Short recess.)

Mr. Sikes: If the court please, we have more or less agreed that probably a half hour more with Mr. Vitco would probably be all right as far as his physical condition is concerned.

The Court: It isn't going to take a half hour, is it?

Mr. Sikes: Sir?

The Court: It isn't going to take a half hour more with him, is it?

Mr. Sikes: A half hour this evening. [223]

Mr. Margolis: I am finished with direct.

The Court: Cross examination, 15 minutes.

Mr. Sikes: Well,——

The Court: I should start limiting both of you gentlemen on this cross examination. You want to just wear out like you do over in the State court. Don't do it over here.

Mr. Sikes: I have only had the opportunity to cross examine one person so far, as I recall, and this is the key witness. I will do my best. But I believe my duty is to cover the points——

(Testimony of Anthony Vitco.)

The Court: Yes, you cover whatever you feel i necessary.

Mr. Sikes: But we have agreed to stop——

The Court: Let's don't go over all this undis puted ground.

Mr. Sikes: That's right, sir.

We do have a stipulation, again in the interes of expediency. I am going to read the fisherman' share of the catches during 1952 subsequent to hi leaving the vessel.

The trip ending February 25, 1952, the trip o which he was injured, on which he allegedly fel ill, $279.10 in the hole. That is, minus quantity.

The trip ending March 27, 1952, the net to eac seaman, $1,161.13.

The trip ending May 5, 1952, the net, $1,150.09.

The trip ending June 5, 1952, $1,501.52. [224]

The trip ending July 25, 1952, the share wa $1,401.17.

The trip ending September 5, 1952, $1,156.63.

The trip ending October 20, 1952, $311.41.

And then, your Honor, we have another tri which I understand we will have to have evidenc on, actually, again sometime in February of '52. I may very well be inapplicable here, but in an event the trip, the next trip ended March 23, 1953 and had a share for each member of $1,290.23.

Mr. Margolis: I will so stipulate. Incidentally I think it might be well to explain that the minu is the share of the groceries—sometimes a share o the groceries is more than the share of the catch

(Testimony of Anthony Vitco.)

Then you have a minus. And the net figures in each case are the figures after the payment by each fisherman of the share of the groceries for that trip. Is that correct?

Mr. Sikes: Groceries and expenses, yes.

Mr. Margolis: Expenses chargeable to the fishermen.

Mr. Sikes: Yes. That's why they come out with a minus.

Mr. Margolis: I want to ask this, if it isn't so that in these figures that the loss from trip No. 1 was deducted from trip No. 2, so that that loss is already taken into consideration when you get the trip No. 2 net?

Mr. Sikes: One moment, if I may, sir.

That is correct, sir. I have a communication which states that the net share—the reason the net share was so small [225] as compared with the gross for the trip which ended on March 27, 1952, was due to the fact that the loss for the preceding trip was deducted along with the deductions for the trip ending March 27, 1952.

The Court: Well, now, was the trip ending March 23, 1953, a part of this same season?

Mr. Margolis: There was an unusual situation, your Honor. There was a strike when the boats were laid up and I am not sure myself what the opposition is going to be. There will have to be evidence on that because there was a period of time and a question of whether the boat was laid up in that time, and other things. It is not a normal

(Testimony of Anthony Vitco.)

situation. Ordinarily, it would not be. We may or may not contend that it is in this situation.

Mr. Sikes: My position, of course, is that it was not.

The Court: Very well. Are you ready to proceed with the cross examination of the libelant?

Mr. Sikes: Yes, sir.

Cross Examination

Q. (By Mr. Sikes): Mr. Vitco, you say you went back to the United States Public Health at San Pedro after you had your electrocardiogram in March of 1952. Did you then go back later?

A. Yes, I did, sir.

Q. When did you go back then next? [226]

A. Well, sir, I would make a mistake on that if I tell you. I don't know if it's possible to find some record. I don't remember. But I know I wasn't entitled to any more because two months elapse and they don't want me any more.

Q. May I ask you this, then: Isn't it true that you didn't go back for an entire year up until March 12th of 1953?

A. I won't deny that, sir. I really don't know.

Q. Isn't it true, Mr. Vitco, that when you were in the United States Public Health Service that you were there in September of 1951, sir?

A. Oh, yes, sir, I was.

Q. And at that time you were complaining of soreness in your chest, is that right, sir?

A. Well, I don't know what was it. I was fish-

(Testimony of Anthony Vitco.)

ing locally here then, for a while, and I had a little flu or something like that.

Q. Did you only go back to the United States Public Health once after you were there the time when you had your heart examined and an electrocardiogram taken?

A. I only took—I believe, I guess they did it all in one day, sir.

Q. I meant, did you only go back once more, is that correct?

A. I believe I did, if you mean after I got a heart [227] illness.

Q. Well, after you had your electrocardiogram taken by the Public Health people, it was after that that you only went back once. You have only been back there once.

A. Not very much times. You might be correct on that. I am not pretty sure. He didn't ask me to come back, sir.

Q. You have been at Public Health a number of times since you have been a seaman, haven't you?

A. In San Pedro I would say not more than three or four times.

Q. Mr. Vitco, you were seen by Dr. Earle in October or November of 1951, is that right, sir?

A. Yes, sir, I was.

Q. And at that time did he tell you that you had an infection in your throat?

A. He told me that I had sinus or something like that, and I had a cold, and he gave me some—a bottle of medicine, some cough medicine. And

(Testimony of Anthony Vitco.)

that is all. He didn't ask me to come back or nothing.

Q. Do you remember whether he told you you had an infected throat?

A. I don't remember, sir. He told me something about sinus, or something like that. But he didn't say about infection. I mean, I didn't understand if he did, sir.

Q. Mr. Vitco, you had had dizzy spells before you ever [228] went on the boat for this trip, hadn't you?

A. You mean the last trip that I went with?

Q. Yes.

A. Oh, sir, to be frank with you, I don't remember if I had then, but I did have them in my life —not severe, but lots of times; weakness and stuff like that.

Q. Now, when you were on the boat at the same time that the captain was telling you that he was sending messages, as I understand it, to the Coast Guard, did you tell him what your symptoms were? That is, how you felt?

A. Oh, yes, I believe I told Joe—that is, Mr. Mardesich—there like pain in my chest and I can't breathe and I am going to die; stuff like that. He was alongside of me. So the way I felt——

Q. Did you have a feeling that there was something caught in your throat?

A. Well, no, you see—the way—this, you can't explain yourself, in that moment what really—except you got terrible pain and hard of breathing;

(Testimony of Anthony Vitco.)

and a lot of things comes. God bless anybody from that. It is just terrible the way you feel when you get those kind of attacks.

Q. Mr. Vitco, I would appreciate it very much if you would listen exactly to what I am asking you. If you want to explain, you may do so.

A. I am sorry. I won't do it no more. [229]

Q. I want you to listen closely. A. Yes.

Q. Did you point out on your body to the captain where your trouble was?

A. I don't remember, sir, on that moment. I think I was very pretty bad sick, if I—I remember later, but the first attack, I don't think I told him much of anything.

Q. I show you what appears to be a photostatic copy of the United States Coast Guard shipping articles. A. Yes.

Q. They refer to the vessel Pioneer and they are dated December 27, 1951; on the second sheet of which appears the name "Anthony Vitco."

Do you know if that is your signature?

A. Well, I tell you—would you permit me—if your Honor please, please forgive me.

Yes, sir, that is my correct name. That is my writing.

Q. And you signed these before you went on—that is before you left on the vessel?

A. Yes, sir, I did.

Mr. Sikes: If the court please, I should like to offer in evidence at this time a photostatic copy of the United States Coast Guard Shipping Articles

(Testimony of Anthony Viteo.)

between the Master of the Pioneer and the various members of the crew, one of which was the libelant, Mr. Anthony Viteo. [230]

Mr. Margolis: If your Honor please, I want to object on the ground that it is incompetent, irrelevant and immaterial. I do not object to it on the ground that it is a photostatic copy or isn't what it purports to be. I suggest, your Honor, we have another legal point here, and my objection may go to the weight and the meaning of the exhibit, rather than to whether it is admissible; although, I am not sure. I, therefore, suggest that my objection be overruled and my motion to strike be reserved for the time of argument.

The Court: Very well. That will be the order.

Mr. Sikes: All right, sir.

What number will that be, Mr. Clerk?

The Clerk: Respondents' Exhibit D.

The Court: In evidence.

(The exhibit referred to was received in evidence and marked Respondents' Exhibit D.)

Q. (By Mr. Sikes): Mr. Viteo, isn't it true that before you came on the vessel you had had a pain in your arm, in your left arm?

A. I don't remember, sir.

Q. Didn't the United States Public Health Service take X-rays of your arm, your left arm?

A. They took the X-ray at my chest, sir. Probably they did the arm, too. I don't remember.

Q. Didn't you come into the United States Pub-

(Testimony of Anthony Vitco.)

lic Health [231] and complain of pain and aching in your arm in November of 1951?

A. In the arm? I don't remember, sir.

Q. You mean you don't remember whether you did?

A. In the arm? I don't remember. I know in the chest. I don't remember the arm. But in the chest I do remember. I know I was there.

Q. Before you went out on the vessel?

A. That was in the summertime, during the local fishing, before I went on Pioneer, sir.

Q. Pardon?

A. Before I went on Pioneer.

Q. You have already told us on direct examination what conversation you heard when you were in the hospital at Manzanillo where you were examined by Dr. Martinez. Can you remember any other conversation that was said either in Spanish or in English at that meeting there between you, Dr. Martinez, Mr. Mardesich and the broker, in addition to what you have already told us?

A. No, sir. If you remind me of some, sir. I don't remember. I told what I heard the doctor say, and the skipper and the broker. That is all I remember.

Q. That is, what you have already told us about, is that correct? A. I believe so, yes, sir.

Q. Now, will you tell us just what your conversation [232] was with Mr. Joncich before you went on the Pioneer relative to you going on it, and regarding your work?

(Testimony of Anthony Vitco.)

A. With Mr. Joncich?

Q. Yes.

A. Yes, sir. Just like any other time that he or skipper called. He ask me if I wanted to go fishing. I stood there a while. I would like to go to San Diego on Normandie because—he asked me—I made already a trip on the big boat Normandie in San Diego—and he asked me, any time I feel like coming back, if I want to go fishing with him—in fact, I told Mr. Mardesich about a month ago that I was going to go down to San Diego. Then Mr Marion Joncich stopped me on the fishing wharf and asked me if I want to go on Pioneer. I fish with Mr. Joncich before a couple of years. And then he retire for one. And he says, "Tony, if you want to come with me I will go, too."

"If it's a good season," he says, "we will go together."

And finally I said, "All right, Marion, I will go."

Q. Can you think of any other conversation that was had between you two at that time?

A. No, sir, I don't know.

Q. It is the custom and practice in the fishing industry at San Pedro that instead of wages a fisherman receives a share, isn't that correct?

A. Absolutely correct, yes. [233]

Q. Isn't it also the custom and practice among the fishermen, and in the fishing industry in San Pedro, that when a man falls ill on a vessel, different from being injured—— A. Yes.

Q. ——that he recover his share of the catch

(Testimony of Anthony Vitco.)

for the trip on which he fell ill but for no other trips after that?

A. Well, sir, I never read the—I can't tell you what's in the contract or how they do. I don't know, sir.

Q. Possibly you have misunderstood me. I didn't want to know what was in the contract. I wanted to know what was the custom, the practice among the fishermen. You have been a fisherman for many years, and I wanted to know what was the custom and practice.

Mr. Margolis: If your Honor please, I wish to object to this question on the grounds it is incompetent, irrelevant and immaterial, because with respect to the question of the right to wages to the end of the period of employment, no custom or practice can change that maritime right.

Mr. Sikes: If the court please, I have looked over——

The Court: Overruled. You may answer.

Mr. Sikes: Would you give Mr. Vitco the question, Mr. Reporter?

The Court: Do you understand the question? Mr. Sikes wants to know what happened in other cases, what was the custom when a seaman fell or became ill at the beginning or [234] middle of the season.

The Witness: But, your Honor, I never been that much away. I never got——

The Court: Did you ever hear of other cases down there where a seaman became ill on the first

(Testimony of Anthony Vitco.)

trip out, or during the next trip out, the secon
or third trip out and couldn't continue with th
season? Have you ever heard of other persons tha
did that?

The Witness: Got sick and——

The Court: Couldn't finish the season.

The Witness: Well, yes, sir.

The Court: Now, as I understand it, what M
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there and the practice of handling that sort of
situation? Would the seaman who fell out sick i
the middle of the season, say,——

The Witness: Yes.

The Court: ——would he get his share of th
catch on to the end of the season, or would he jus
get the share of the catch up through the last voy
age he was on?

The Witness: Well, your Honor, to tell you th
truth I don't know how they figured that out.
don't know how they figured that out.

Q. (By Mr. Sikes): Then I will ask you thi
Mr. Vitco: Didn't you become ill on the Pionee
in April of 1948? A. Yes, sir, I did. [235]

Q. And you came home, didn't you?

A. Yes, sir, I did.

Q. And you shared in the catch of that partic
lar trip, didn't you?

A. I believe they give me money, sure, for tha

Q. And you didn't go out on the next trip, di
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(Testimony of Anthony Vitco.)

Q. And you didn't receive your share of the catch on the next trip, did you?

Mr. Margolis: Just a moment. That is objected to on the ground that it is incompetent, irrelevant and immaterial as far as establishing custom. You do not establish custom by a single case.

Mr. Sikes: If the court please, this is also in the nature of impeachment, just what he got through saying, that he never knew what that custom was, what happened in these cases. I believe that is a direct impeachment of what he just got through saying.

The Court: Overruled, on the latter ground. He may answer.

The Witness: May I——

The Court: Were you paid that season for any later trips which you did not make?

The Witness: I wasn't paid, your Honor, until I got back on the boat again. [236]

Mr. Sikes: Thank you.

Q. (By Mr. Sikes): Now, isn't it also the custom and practice, Mr. Vitco, that the crew can leave the vessel at the end of any voyage and they are not bound to continue on through the end of the year?

The Court: The year or the season?

Mr. Sikes: The season.

The Witness: The crew can leave?

Q. (By Mr. Sikes): Yes.

A. You are correct in that.

The Court: In other words, if a seaman is hired

(Testimony of Anthony Vitco.)

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The Court: In other words, if a seaman is hired

(Testimony of Anthony Vitco.)

for the season, it is the custom and practice down there at San Pedro that at the end of any voyage he can take his share up to that time and quit?

The Witness: That is correct, your Honor, yes.

Mr. Sikes: I am just checking off repetition, sir. I am really making time here.

The Court: You just take your time. I want you to labor under pressure.

Q. (By Mr. Sikes): Isn't it true, Mr. Vitco, that you told some of the members of the crew when you were down in the Mexican waters after your first attack on January 3rd, from then up to January 29th, didn't you tell various members of the crew that you did not want to go home?

A. I asked them—asked Mr.—the skipper, the captain, [237] I asked him three times, I begged him, and I asked his brother Nickie—Nickie told me to go ask Joe to let me go and see my family once more. What else can I do?

Q. I am awfully sorry, Mr. Vitco, and I don't want to pressure you too much, but I want you to listen to my question. That is the main thing, if you will just listen.

Isn't it true, Mr. Vitco, that you told several members of the crew, between the time you had your first attack of January 3rd and January 29th, that you did not want to go home?

A. I never remember saying that, sir.

Q. Do you deny that you said it?

A. Well, I don't remember I said it. I know I

(Testimony of Anthony Vitco.)

beg to go home. But I don't remember to say when I was sick that I don't want to go home.

Q. Well, sir, would you say that you did not say it?

A. Well, I wouldn't swear that I did not say it, sir. But I don't remember saying it. I know I asked to send me home, but they didn't want to.

Q. Isn't it true that after having seen the doctor, the Mexican doctor in Manzanillo, that you asked Mr. Mardesich to continue on with the fishing and to let you go out with the vessel again; that you wanted to try it again?

A. I want to go home so bad that time.

Q. I am sorry. You aren't listening to my question.

Isn't it true that you told Mr. Mardesich, after having [238] seen the Mexican doctor, isn't it true that you told him, Mr. Mardesich, that you wanted to go out again on the vessel and you wanted to try again? Isn't that true?

A. I don't remember saying that.

Q. Pardon?

A. I don't think I ever said that. I don't remember saying that I wanted to go out when I was that sick.

Q. You deny under oath here that you said that?

A. I don't remember saying it. I sure tell you I don't remember ever asking Mr. Mardesich take me fishing out after——

The Court: Didn't the vessel go back to fishing

(Testimony of Anthony Viteo.)

after Dr. Martinez examined him? Is there a dis pute about that?

Mr. Sikes: No, sir. I am trying to find ou whether he really was so anxious to go home, o whether he in fact said, "Let's go out again—" he himself. That is what I was asking.

Q. (By Mr. Sikes): Well, I would like an an swer if you can——

A. I told you I pretty sure, sir, that I never sai that. I was so sick I really wanted to go home To tell you the truth, I never felt like going hom in my life like I did this time. But you can't wall home from down there. I had no money or any thing to go home, if he didn't give me money.

Q. I will ask you this: Did you ask Mr. Marde sich [239] for money to send you home then whe you came out of the doctor's office?

A. Yes, sir, I did. He gave me—then second time when we come in he give me money. On th second—after we went out and then come in, h gave me——

Q. Well, I am talking about the time when you were examined by the Mexican doctor. When you were on shore that time did you ever ask Mr. Mar desich to send you home or to arrange for your airplane?

A. I asked him to send me home, sir.

Q. Did you ask him——

A. He said, "We are going to try four more days." And I don't think, sir, that—I don't re member, but I don't think we stood four more days

(Testimony of Anthony Vitco.)

ut. They have to come in sooner than that with
ie.

Q. What did you say to him when he said, "We
re going to try it for four more days"?

A. I told him I was going to give him nothing
ut trouble. He says, "We are going to try four
iore days." And I think that is what we did. I
on't know how many days we stood; but not too
iuch.

Mr. Sikes: This won't be long, your Honor.

The Court: Take whatever time you require.

Q. (By Mr. Sikes): Did you complain at all
o the Mexican doctor about any pains in your
hest? [240]

A. In the chest and in the arms, sir.

Q. You did? A. Yes.

Q. Did the Mexican doctor use a stethoscope on
'ou?

A. I don't want to say one word that isn't true.
wonder if Mr. Mardesich would help me on that.
don't know if he did or not, to tell you the truth,
ir.

Q. All right.

All during the time when you came back, that is
fter you had come back on January 30, 1952, you
new, didn't you, that you were entitled to free
nedical treatment at the United States Public
Health in San Diego?

A. Yes, sir, I did. In fact, the skipper, Mr.
Mardesich told me to go in medical, in what you
nay call it.

(Testimony of Anthony Vitco.)

Q. To the U.S. Public Health?

A. That's right. I knew that.

Q. Did you go?

A. No. Mr. Joncich took me to another docto

Mr. Sikes: I am going to quit at this time, you Honor. I am five minutes over.

The Court: Take whatever time you need. don't like to limit counsel arbitrarily.

Mr. Sikes: If I think of something else, sir, may call him as an opposition party for a coup of questions tomorrow, if we have some time, si

Mr. Margolis: I have no objection to putting over. I may want to ask a couple of questions o redirect.

The Court: You may step down.

(Witness excused.)

Mr. Margolis: Your Honor, subject perhaps t a few questions on redirect, and any further cro that Mr. Sikes wants to have tomorrow morning o Mr. Vitco, the libelant rests.

The Court: How much testimony will you hav Mr. Sikes?

Mr. Sikes: I have Mr. Joncich. And I think might put him on and get him off. It is prett short. I could do that now, with the court's indu gence, and then——

The Court: Very well.

Mr. Sikes: ——tomorrow I will either have hi alone, Mr. Mardesich, or two of the crew member and Mr. Mardesich for a very short examinatio

The Court: We should be able to finish in two or three hours.

Mr. Sikes: It begins to look better all the time. Mr. Joncich.

MARION JONCICH

called as a witness by the respondents, being first sworn, was examined and testified as follows:

The Clerk: Give me your full name.

The Witness: Marion Joncich. [242]

The Clerk: How do you spell that?

The Witness: M-a-r-i-o-n J-o-n-c-i-c-h.

Mr. Sikes: If the court please, there may be some language difficulties here, so I would like to say two or three words first to the witness.

Mr. Joncich, the main thing is not to talk too fast.

The Witness: I am going to try.

Mr. Sikes: Talk so that his Honor can hear and Mr. Margolis and I can hear you.

Direct Examination

Q. (By Mr. Sikes): Now, your name is Marion Joncich, isn't it? A. Yes.

Q. And you are one of the owners of the Pioneer? A. Yes.

Mr. Sikes: If the court please, I am just making some preliminary leading statements.

Q. (By Mr. Sikes): You were not on the Pioneer when it went on this voyage when Mr. Vitco became ill, were you? A. No.

Q. Now, did you ever have a conversation with

(Testimony of Marion Joncich.)

Mr. Vitco sometime in the late fall of 1951 regard ing him going to work for you?

A. Well, I met him down in the fishing doc you know, San Pedro, one morning and I told hin he want to come fishing [243] because I know fis ing, because Mr. Mardesich run the boat.

Q. Now, not too fast. I meant not too fast o your speaking. It's for the reporter. You go ahea

A. Then Mr. Vitco answered me that he wa to come.

Q. Did you have any conversation with M Vitco after he came back? He came back, I believ on January 30th, 1952. A. Yes.

Q. Did you have more than one conversatio with him?

A. Well, yes, he used to call me up on the phon every once in a while; once or twice, somethin like that.

Q. And will you tell us what your conversation were with Mr. Vitco relative to the trip or his ill nesses or doctors or anything along that line?

A. Well, Mr. Vitco come in from Mexico, h call me up on the telephone that day he come i Then he told me, he said, "Marion, I come sick I can't stay any longer."

And then I say, "what's the matter with you What doctor said that?"

And he said, "I got something in the throat. don't know what's the matter."

Then I asked him, I say, "I like come see yo tonight."

(Testimony of Marion Joncich.)

And he say, "No, I'm tired. I just come in with the plane, and I am awfully tired." [244]

Then I go next day.

Q. Do you mean by that that you went to his house? A. Yes.

Q. And did you two have a conversation there?

A. Yes.

Q. What was said there?

A. And he asked me, he say, "Mr. Joncich, what doctor you going to? You be sick for long time."

And I told him, "Mr. Vitco," I say, "I change so many doctor." I say, "This one is the best one for me, Dr. Ulrich, Crenshaw Boulevard."

Q. May I interrupt for a moment. Were you yourself then going to Dr. Ulrich, being treated by him? A. Yes. I going every week.

Q. Continue then about this conversation.

A. Then he asked me, "When you going to go up?" I say, "I go once a week. I going to go day after tomorrow."

Then he told me, he say, "If you make appointment for me I gonna go see him." And he said, "But I can't drive. If you take me, I appreciate that"

Then I call up next day. Then I call him back. I say, "If you want to come, I gonna come and get you. I got appointment for you."

Mr. Sikes: Thank you. You may cross examine.

(Testimony of Marion Joncich.)

Cross Examination

Q. (By Mr. Margolis): Mr. Joncich, if you don't understand any question I ask you, you say so. A. Okay.

Mr. Sikes: If the court please, I have found in talking to him that if you talk slowly he understands the question much better.

Mr. Margolis: I will do my best.

Q. (By Mr. Margolis): Mr. Joncich, do you remember when you met Mr. Vitco down at the fishermen's pier and you talked to him about going to work on your boat, the Pioneer? Do you remember that? A. Yes.

Q. Do you remember then, did he say to you that he could go on another boat and was thinking of going on another boat from San Diego?

A. He never told me that.

Q. He never told you that? A. No.

Q. All that happened was that you asked him to go and he said, "All right, I will go"?

A. And he told me like this, he say, "I gonna talk to my wife tonight and I let you know tomorrow." Then he let me know next day; called me, said he gonna come. [246]

Q. Did you tell him you would start working on the boat to get it ready for the trip?

A. That was sometime in November. I don't exactly what day it was. But we start working sometime in November. I do know 15th or 20th, something like that.

(Testimony of Marion Joncich.)

Q. About the middle of November?

A. November.

Q. And this was before you went to work?

A. Yes.

Q. You were going to go to work to get the boat ready for the season, whole season.

A. Whole season.

Q. And that meant until you laid up the boat at about November, maybe, or December of the next year?

A. Is for season, that was; but two seasons in the year, see—two season in the year.

Q. Do you lay your boat up in between these two seasons in the year?

A. Yes. Always two seasons every year, regarding the contract. This in the contract.

Q. I am not talking about what is in the contract. You were going to get the boat ready in November to go out. A. Yes.

Q. For how long were you getting the boat ready? For just one trip? [247]

A. For season, we do. For season, January, February March, and for——

Q. For the whole season.

A. For season, yes.

Q. But when is the next time that the boat was laid up and this same work was done again?

A. Well, two season in the year.

Q. When is the next time? Do you understand this question? A. Yes.

(Testimony of Marion Joncich.)

Q. Let me start over again. In November you paint the boat?

A. Sometime in November.

Q. You start in November and you paint the boat, fix it up, right? Fix the net. Took the net off the boat and fixed it? A. Yes.

Q. And then the net is put back on the boat and you get stores, provisions to go fishing, and you put that on the boat?

A. Yes. That last day before you go out.

Q. Before you go out. All right. Then when was the next time after that that you painted the boat and that you put—took the net off and fixed the boat? When was the next time?

Mr. Sikes: I object to that, your Honor, on the grounds [248] that it is absolutely immaterial to the issues of this case.

The Court: Overruled.

Mr. Margolis: Mr. Joncich, I try to make my questions clear. Do you understand them?

The Witness: I gonna try.

Q. (By Mr. Margolis): Well, Mr. Joncich, you fix up the boat in November, November, December 1951. You remember that? Then you go fishing. You went fishing for more than one trip; for several trips. A. Yes.

Q. You understand that? When did you again paint the boat and take the net off and fix it? When was it?

A. Well, you know how it is, when you go into dry dock every three months.

(Testimony of Marion Joncich.)

Q. About the men? I don't mean when you go into dry dock. When the men paint the boat and take off the net and fix it. When was that again?

A. They used to do it in July, June and July.

Q. Do you usually do the same thing in June or July?

A. No crew. I used to do it through the shipyard.

Q. Well, when is the next time that the crew did the same thing that it did in November or December of 1951?

A. Well, it's difficult. We used to make some time in two or three different places. You know, big nets in the beginning of the season, then after while, July, June and July, [249] we make small nets—do it twice a year.

Q. Yes. But what I am talking about is when you do all this work of the crew, painting the boat, taking off the net—once you do a big job on the net, right; fix up the whole net?

A. Yes. But after six months we change them again.

Q. But do you do the same thing over again in six months? A. Yes.

Q. You paint the boat again?

A. Crew no doing, but shipyard doing.

Q. But when is the next time that the crew paints the boat?

Mr. Sikes: May I offer a stipulation? It may clear it all up. May I consult with counsel?

The Court: Yes.

(Testimony of Anthony Vitco.)

Redirect Examination

Q. (By Mr. Margolis): Mr. Vitco, I show you Respondents' Exhibit D. That is the one on which you identified your signature yesterday. You remember? You said this is your signature?

A. That is correct, sir.

Q. You notice the printing on the first page here the writing, printing on the first page?

A. That's right.

Q. Did you ever read that? A. No, sir.

Q. Did anybody ever read it to you?

A. No, sir. [254]

Q. Did anybody ever tell you to read it?

A. No, sir.

Q. Did anybody ever tell you what was in that language? A. No, sir.

The Court: May I see it, Mr. Clerk?

(Whereupon the document was handed to the court.)

Q. (By Mr. Margolis): Mr. Vitco, you testified that in 1948 when you became ill and you were off for one trip you didn't get paid for that trip. Remember? When you were on the Pioneer in 1948?

A. I was off for two trips.

Q. Two trips? A. That's right.

Q. Well, you were off for part of one trip, weren't you? Didn't you leave the vessel in the middle of the trip? A. That's right.

Q. And then were you off one more trip, or two more trips? A. Two more, sir.

(Testimony of Anthony Vitco.)

Q. Now, on the trip that you were off part of the trip, did the ship go back fishing after you were off, as far as you know? A. Yes.

Q. Did you get paid a full share for that trip?

A. Yes, sir, I did. [255]

Q. Now, when you came back here, because you were sick, in 1948, did you take an airplane back?

A. Yes, sir, I did.

Q. Did any owner of the boat, or did the boat pay for your transportation expense?

A. No, sir. Mr. Joncich gave me $2 for expenses, and I paid the rest of it.

Q. Did you ever sue them for that or do anything about it? A. No,——

Q. Just tell me whether or not you did.

A. No, sir, I didn't.

Q. You didn't sue them about the wages they didn't pay you for those two trips?

A. No, sir, I didn't.

Q. Now, Mr. Vitco, I think you also testified, or Mr. Sikes asked you whether during the season when a boat came in, a man could quit; a fisherman who had been hired for the season could quit. And you said yes. A. I say yes, sir.

Q. All right. Now, under the custom does he just get up and say, "I quit"? Is that how it is done?

A. No, sir. You supposed to give the skipper notice, seven days' notice that you was going to quit.

Q. In other words, during the season seven days'

(Testimony of Anthony Vitco.)

notice [256] is required before you can quit, is tha right? A. Yes, sir.

Mr. Margolis: All right. That is all, your Honor

Recross Examination

Q. (By Mr. Sikes): Mr. Vitco, I am referring to the exhibit which his Honor is looking at, which is——

The Court: Do you wish it?

Mr. Sikes: No, sir.

Q. (By Mr. Sikes): ——Exhibit D, and I want to ask you if you had ever signed any such shipping articles before this particular boat?

A. Oh, I have been signing them since '25 or '6 since I started to fish in Mexican waters.

Q. More or less 25 or 30 years?

A. That's right, correct.

Q. And did you understand that you had to sign those shipping articles whenever you went into foreign waters? A. That's right, sir.

Q. And you knew, of course, when you signed these shipping articles on December 27, 1951,——

A. Yes.

Q. ——that you were going on a foreign voyage, isn't that right? A. That is right, sir. [257]

Q. What did you understand the shipping articles to refer to?

A. The only thing that I understand, that was in my knowledge, we have to give them three pictures and go to this broker and sign your name. I think that was so we can come in, back and forth

(Testimony of Anthony Vitco.)

from Mexican waters. That is all I know, I think. I don't know. Just to sign my name and age, nationality and weight and your color. That is all I know.

The Court: You sign articles like this for each trip or only at the beginning of the season?

The Witness: No, your Honor. Just at the beginning of the season.

Mr. Margolis: Your Honor saved my getting up.

Mr. Sikes: I believe that is all then, your Honor.

Mr. Margolis: No further questions, your Honor.

The Court: You may step down, now, Mr. Vitco.

(Witness excused.)

The Court: Does the libelant rest?

Mr. Margolis: Your Honor, I might say this: I am prepared to rest. I assume counsel is going to put Mr. Mardesich on. I am going to ask him questions about these articles, but I will ask him on cross examination.

Mr. Sikes: That is perfectly all right with me. May I have just a second?

The Court: Yes. [258]

Mr. Sikes: Mr. Mardesich, please.

JOSEPH C. MARDESICH

a witness called on behalf of the respondents, being first sworn, was examined and testified as follows:

The Clerk: You may be seated. State your full name.

The Witness: Joseph C. Mardesich.

(Testimony of Joseph C. Mardesich.)

The Court: How do you spell that?

The Witness: Joseph, J-o-s-e-p-h, C. Mardesich M-a-r-d-e-s-i-c-h.

Mr. Sikes: If the court please, in my opening statement I said that I thought the evidence would show that Mr. Vitco had come back to the United States, at the most, within 48 hours after having been seen by the doctor in Manzanillo. You may recall that. I based that on the evidence in the case which was the deposition of Dr. Martinez, who stated that he examined Mr. Vitco on January 29th and Mr. Vitco had testified he came home on January 30th, and that was at that time what I based it on. I had no intention of misleading the court at all because of those two dates there.

Mr. Margolis: I think, your Honor, that we can agree he was examined by the doctor on the 24th.

Mr. Sikes: I believe it was the 24th, yes. But in the deposition it said the 29th and his deposition said the 30th, when he came home. [259]

Direct Examination

Q. (By Mr. Sikes): Mr. Mardesich, where do you live? A. San Pedro.

Q. How long have you lived in San Pedro?

A. Since 1936.

Q. For how long have you been a commercial fisherman? A. Since 1930.

Q. Have you been fishing ever since then?

A. Yes, I have.

(Testimony of Joseph C. Mardesich.)

Mr. Sikes: Now, I am going to lead a little, if may.

Q. (By Mr. Sikes): The Pioneer left San Pedro on or about December 27, 1951, didn't it?

A. Yes.

Q. And it went into the Mexican waters, is that orrect? A. Yes.

Q. Can you recall approximately when the Pioeer returned from that voyage, as closely as you an? A. We came back in late February.

Q. Of 1952? A. Of '52.

Q. You were in court when we read some figures ff yesterday, were you not? A. Yes.

Q. Some financial matters relative to the share f the [260] catch on certain trips. A. Yes.

Q. There was one trip that we referred to as nding in March of 1953? A. Yes.

Q. Do you recall now when that voyage began?

A. Yes, January 29, 1953.

Q. For how many of these 25 years have you been the captain or a part owner of a vessel?

A. I have been a captain since 1951.

Q. Were you ever a crew member on ships?

A. Previous to that time I was engineer, since 944, on the same boat.

Q. And before that what was your position in he fishing industry?

A. Before that I was engineer on various other oats.

Q. I see. Now, is there a custom and practice as o the payment of shares of catches to fishermen

(Testimony of Joseph C. Mardesich.)

who become ill on a voyage and are unable to con tinue the voyage?

Mr. Margolis: I object to that on the groun that the question of custom and practice cannc control maritime law, your Honor, on the questio of whether a seaman is entitled to wages to th end of the period of employment.

The Court: Overruled. You may answer whethe there is such a custom. [261]

The Witness: Yes, sir.

The Court: How long has that been the custom

The Witness: As far as I can remember. It' always been a custom if a man became ill on a cer tain voyage he received his share for that voyage

Mr. Sikes: He received more than just his shar up to when he quit. He received his share for th entire voyage.

The Court: Are these shares—is it the custor for these shares to be actually paid at the en of each voyage, following the termination of eac voyage?

The Witness: Yes, they are. After we unloa our fish we then know how much we are going t receive and then we make our figures and make ou payments.

The Court: As I understand it, a vessel ma make four or five or six trips a season, and betwee each trip there is an accounting, and the seamen ar paid their shares for the trip last completed, i that it?

The Witness: There are cases where the boat i

(Testimony of Joseph C. Mardesich.)

in a hurry to go back out to sea again, and didn't wait for that money.

The Court: We are speaking now of custom, custom and practice.

The Witness: The custom is to make your figures before you go out again.

The Court: And pay the shares? [262]

The Witness: And pay the shares.

Mr. Sikes: You may cross examine.

Cross Examination

By Mr. Margolis:

I might say that I am caught by surprise.

The Court: Do you wish some time?

Mr. Margolis: No. I think I can go ahead.

Q. (By Mr. Margolis): Mr. Mardesich, now on this business of a custom to pay a man who becomes ill on a boat only for that particular voyage, how did you obtain your knowledge of that custom? What I mean is—well, let me make it a little more specific.

Did you just learn that from the way the boats you were on operated, or did you learn that from conversation around or from some contracts? How did you learn that?

A. I learned that from experience of my own and other boats.

Q. And this is what you generally heard about, is that right? A. Yes.

Q. Now, on this custom that you are talking

(Testimony of Joseph C. Mardesich.)

about, did that apply also to men who are hurt or the boat?

A. I am sure the man that got hurt on a boa would also receive his wages for that trip.

Q. I am talking about custom. Does he receive the wages [263] only for the trip or the entire sea son if he is hurt?

A. I haven't experienced anything like that.

Q. How many years have you been fishing?

A. Like I say, I have been fishing since 1930.

Q. And you haven't had any——

A. Accidents aboard——

Q. ——any accidents aboard which a man had t leave the boat in the middle of the season, sir??

A. You mean leave the middle of the season and don't come back for the rest of the season??

Q. Or makes a trip or two; just miss part of th season, part or all of the rest of the season.

A. If he got hurt aboard and he missed the res of that trip and he was getting well ashore, h usually put another man in his place. He would no receive wages for the next trip, or his share.

Q. So the custom is if a man is hurt aboard a boat he does not get the wages to the end of th season, is that right?

Mr. Sikes: I am going to object to that, since th end of the season may have coincided with the end of the voyage. I would like to have counsel keep——

Mr. Margolis: I think the objection is good and I will rephrase the question.

Q. (By Mr. Margolis): Now, where the season

(Testimony of Joseph C. Mardesich.)

ends at a point beyond the end of the voyage on which a man is injured [264] as a result of which he has to leave the boat, is it your testimony that the custom is that he does not get wages to the end of the season?? A. Yes, sir.

Q. And when you said a few moments ago you had no experience with respect to this subject were you in error and you now recall that you have had experience on the basis of what you can testify as to custom? A. I can't remember, sir.

Q. Then what do you base the knowledge of this custom on?

A. You mean a man getting hurt aboard?

Q. Yes. A. Base it by hearsay.

Q. I see. Just that you have been told that this is the way it is done.

Has it ever happened that a man has been hurt aboard the boat you have been working on?

A. No, sir.

Q. In 25 years?

A. Yes, sir, nobody has been hurt that I know of—seriously.

Q. It is a remarkable record, sir.

A. Nobody hurt.

Q. Now, you came back from the first trip toward the [265] end of February 1952, about February 23, 1952, would that be about right?

A. Well, you mean returned to San Pedro?

Q. Yes. A. Right.

Q. About that date? Would you say that would be about right?

(Testimony of Joseph C. Mardesich.)

A. Will you tell me again what that date was?

Q. February 23, 1952. A. Yes.

Q. About that date? A. Yes.

Q. Then you went out on another trip and came back about the end of March 1952?

A. Yes, sir.

Q. You stayed in a few days and left about April 2, 1952? Would that be about right?

A. Right.

Q. You came back about May 4, 1952?

A. Yes.

Q. And then you left again about May 13, 1952?

A. Yes.

Q. And came back about June 5, 1952?

A. Yes.

Q. And then there were other trips up until the one that you came back on September 8, 1952 of that year? [266] A. Yes.

Q. That was the last trip that you made in the year 1952? A. Yes.

Q. Now, actually, between each of these trips you were in port a few days, isn't that right?

A. Yes.

Q. Five days, six days, seven days; it would vary, but it would be just a few days?

A. Yes, sir.

Q. And you didn't, for example, in the middle of the year, in, say, between the fourth and fifth trip and the fifth and sixth trip take any longer time off or do anything special between trips——

Well, I will withdraw that.

(Testimony of Joseph C. Mardesich.)

There was no time during these trips when in between trips you took any time, substantially longer than there was between the other trips? Isn't that so? A. There was a time, sir.

Q. In the year 1952? A. Yes, sir.

Q. When was that?

A. The trip after Mr. Vitco stayed ashore.

Q. And you remained in how long that time? Do you remember? [267]

A. I don't remember, sir, but we were broke down.

Q. There had been some mechanical damage?

A. Yes, sir.

Q. And did you have to go into dry dock?

A. We went into the machine shop.

Q. You went into the machine shop. And this is the sort of a thing that happens once in a while and whenever it happens you have to go in?

A. Yes, sir.

Q. All right. Aside from that, when you came back on this first trip, was there any other trip during which you stayed in longer than five days, seven days, something like that?

A. No, I don't believe so.

Q. There wasn't any time during that year when you stayed in long enough in between trips—well, I will withdraw that.

I am talking about the period after you went out December 27, 1951, and until you came back in September 1952. I am not talking about the part of the year after September '52. A. Yes.

(Testimony of Joseph C. Mardesich.)

Q. Just that period. During that period from December to September, there wasn't any time when you came in and painted the boat and took the net off and repaired the whole net, was there? [268]

A. No, sir.

Q. Now, you did that kind of an operation in November and December of 1951, didn't you?

A. Yes, we did.

Q. When was the next time that you did that?

A. Preceding the last trip of '52 we went to the machine shop—but I am not certain.

Q. Preceding the last trip of '52? Well, let me recall that you didn't go out in December of '52. You didn't go out until January 19th. So it would be preceding that January 19th trip, is that right?

A. No, sir.

Q. Preceding what trip?

A. Preceding the September trip.

Q. You had machine trouble again at that time?

A. No. But that was a laid up period.

Q. For how long were you laid up?

A. Until we went out again.

Q. That, I am sure, is so. But how many days or weeks?

A. Well, approximately three and a half months.

Q. Well, that was after the September trip, wasn't it? A. Yes.

Q. All right. Then you and I really misunderstood each other. The ship was laid up from about September 8th, 1952 to January—well, sometime in January, about the middle of [269] January, 1953.

(Testimony of Joseph C. Mardesich.)

A. Yes, sir.

Q. Now, during that time was the boat painted nd the net fixed, or was it fixed after that January rip? A. During that time.

Q. It was during that time? A. Yes.

Q. I see. And that is the time when you cus-omarily go through this operation of painting the hip and completely overhauling the net and so orth, isn't that right? A. Yes.

The Court: Does the master receive the same hare, ordinarily, as a crew member?

The Witness: No, he receives more.

The Court: That comes from the boat's net hare?

The Witness: The net shares, yes, sir.

Q. (By Mr. Margolis): Going back to the sub-ect that we asked you about, this might refresh our recollection, isn't it a fact that in the last sev-eral years, four or five years, your own brother, who s a fisherman, hurt his back and was out a trip during the season? A. Yes.

Q. Do you know what happened in his case with respect to whether he got paid?

A. Yes, I do. [270]

Q. Did he or did he not get paid for that trip?

A. He did.

Q. So that when a man gets hurt it is customary for him to get paid? A. Yes.

Mr. Sikes: If the court please, the last question may very well be ambiguous. The last question, as I understand it, was when a man is injured does he

(Testimony of Joseph C. Mardesich.)

get paid. Now, I am unable to determine whethe Mr. Margolis means for that voyage or for th year, or——

Mr. Margolis: I think counsel again is right, a usual.

Mr. Sikes: Thank you.

Q. (By Mr. Margolis): What I meant, and pe haps I didn't make myself clear, was he missed th trip, didn't he, or more than one trip, as a result o being hurt? A. Yes.

Q. Did he get paid for the trip he missed?

A. No.

Q. He did not?

A. You mean the preceding trip?

Q. For the trip he missed. He missed the trip He didn't go out on a trip, isn't that right?

A. You mean he didn't go out at all?

Q. He was hurt. Is that right? He had to leav the vessel. Is that so? [271]

A. You mean the vessel was already out?

The Court: You tell us.

Q. (By Mr. Margolis): Tell us what happened

The Court: What did happen?

The Witness: Well, there is two occasions, bu only occasion is when my brother got hurt.

Q. (By Mr. Margolis): Well, that is what I a talking about, when you brother got hurt.

A. We sent him home on another boat.

Q. Then didn't he miss a trip after that? Didn the boat go one trip without him?

A. Yes, I believe so.

(Testimony of Joseph C. Mardesich.)

Q. Did he get paid for that trip, the one that he missed? A. No, sir.

Q. So it is the custom not to pay men, according to your understanding, even when they are hurt on the boat for the trip that they missed, is that right?

A. Yes.

Q. And then after he missed that trip did he come back on the boat?

A. As soon as he was well enough.

Q. Now, when you go on a trip into Mexican waters there is a time limit that that trip can take, isn't there? A. Yes. [272]

Q. You have to get a license from—is it the Mexican government that you get a license from?

A. Yes.

Q. And under that license the trip is ordinarily limited to 70 days, or some such period?

A. Yes.

Q. In any event, wouldn't run over 90 days, the period in which you take on the trip, is that right?

A. You can stay a lot longer if you renew the license.

Q. But ordinarily how long does one of these fishing trips take?

A. The average trip is between 30—25 to 30 days.

Q. 30 days. What's a real long trip?

A. The extent of the license, approximately 70 days.

Q. That is a very long trip, isn't it, and very unusual? A. Yes, sir.

(Testimony of Joseph C. Mardesich.)

Q. So that you wouldn't think of a trip lastin 12 months into Mexican waters, would you?

A. No, sir.

The Court: Is the master counted as a membe of the crew in orginally dividing the share?

The Witness: Member of the crew. Divide th crew share.

The Court: And the rating of the vessel is a eight-man vessel. Does that include the master?

The Witness: Yes, that also includes the maste

The Court: The master and a crew of seve would be an eight-man vessel?

The Witness: That's right.

Q. (By Mr. Margolis): Mr. Mardesich, these ar ticles, Exhibit D, are signed the 27th day of De cember, 1951. At the time these articles were signed Mr. Mardesich, Mr. Vitco and the other membe of the crew had already done the preparatory wor for going out, isn't that right? They had alread done the painting and the fixing of the net?

A. Yes, sir.

Q. So that these articles were signed long afte the men had been hired, isn't that right?

A. They are signed the day before you leave.

Q. Just the day before you leave. But the me are hired, aren't they, maybe two months befor you leave so that you can get the work done on th boat that they have to do? A. Yes, sir.

Q. Now, do you know who prepared these ship ping articles? A. Yes, sir.

Q. Who did?

(Testimony of Joseph C. Mardesich.)

A. Antone Despol, our broker.

Q. And he was your broker? You hired him, and not Mr. Vitco? [274] A. That's right.

Q. Or any of the members of the crew.

Now, did you tell him what to put in here?

A. No, sir.

Q. He just put in what he thought was right, is that it, as far as you know?

A. I never read them myself.

Q. You never read these articles?

A. No, sir.

Q. You sign them but you never read them?

A. No.

Q. Do you know of any fisherman who ever has?

A. I can't recall.

Mr. Margolis: Your Honor, as I said, I was caught by surprise. I expected the testimony to cover many other subjects and, therefore, was prepared to go along. I would like about a 10-minute recess so I can see what else I must cover.

The Court: Very well. We will recess for 10 minutes.

(Short recess.)

Mr. Margolis: Your Honor, there are a couple of matters we can dispose of very quickly by stipulation. One is that the fifth trip of the season—your Honor has a list of them—I don't want to use the word "season", but the fifth trip that we are concerned with, started on June 14, 1952, and was completed on July 25, 1952. [275]

(Testimony of Joseph C. Mardesich.)

Mr. Sikes: That is so stipulated as a matter of fact, your Honor.

The Court: There is no stipulation with respect to the commencement of the other trips?

Mr. Margolis: Well, we didn't—may I state to your Honor what the importance is of the commencement of that particular trip? We are going to have an issue here as to whether there are no wages due; whether there are wages due only for a season of six months, which ends with the last trip which begins in June, or whether there are wages due for all of the trips in 1952.

I will state right now to your Honor that as far as the trip which began in January of 1953 there is no issue about that because we make no claim with respect to that. I didn't have all the facts. Now having all the facts we are not entitled under any view of the case to that one. So the exact starting date of that June trip is important because if your Honor should hold the season is the six-month season that would be included within. The exact starting date for the others, at least I can't see any great materiality.

Mr. Sikes: And I join in that statement, Mr. Margolis.

Mr. Margolis: Also, I misspoke myself in asking certain questions, your Honor. The last trip started in September and ended in October 18, 1952. And counsel, as I understand it, is willing to stipulate that all the questions and answers [276] with respect to the last trip of 1952 can be dealt with by

(Testimony of Joseph C. Mardesich.)

your Honor as though they had referred to a trip ending October 18, 1952.

Mr. Sikes: That is correct, sir, because the trip did begin in September, and undoubtedly the witness believed, as did Mr. Margolis, they were talking about the same thing, which they were in fact——

Mr. Margolis: That's correct.

The Court: Very well, gentlemen.

Q. (By Mr. Margolis): Now, Mr. Mardesich, at the beginning of a fishing season there is done this painting and the fixing of the net that we have talked about, isn't that right? A. Yes.

Q. Then at the close of the fishing season isn't it a fact that then you wash the boat, you strip the net and put away the gear?

Mr. Sikes: Objection, your Honor, on the grounds that it calls for a conclusion on the part of the witness as to what is meant by season.

Q. (By Mr. Margolis): Well, at the close of what is generally considered the season, isn't that when this is done?

Mr. Sikes: I am going to object——

Mr. Margolis: Customarily.

Mr. Sikes: ——to that, also. If counsel wants to go [277] into first as to what he things the season is, I believe there would be a foundation, sir.

The Court: I suggest you turn the question around the other way. There is certainty as to what was done?

Mr. Sikes: Yes, your Honor.

(Testimony of Joseph C. Mardesich.)

Q. (By Mr. Margolis): Well, without regard to season at this point, there is a time each year, or maybe more often, I am not trying to find out, when a boat that fishes tuna all year round, the crew that was on that boat washes the boat, strips the net and puts away the gear? That happens each year, doesn't it? A. Yes.

Q. And that happens once a year on a boat that fishes tuna all year round, isn't that right?

A. Yes, sir.

Q. And that once a year that that happens is in oh, October, November, December—well, October November, generally, when the boat stops fishing for a period of a couple of months, or so, isn't that right?

A. Yes, usually the slack period.

Q. During the slack period.

Q. During the rest of the time the boat is customarily—absent engine trouble or something of that kind—fishing, except in between trips, where it will be in port for a few days at a time? [278]

A. Yes, sir.

Q. Now, Mr. Mardesich, you started as a skipper of the Pioneer in 1951, was it? A. Yes.

Q. That was the first boat you had ever skippered? A. Yes.

Q. And you started there at what is customarily considered the beginning the season, did you not?

A. Yes.

Q. And that was about? About December of 1950 or December of 1951?

Testimony of Joseph C. Mardesich.)

A. December of '50.

Q. December of '50. And the season for which ou were going to fish was the season which is cus-marily known as the 1951 season, isn't that right?

Mr. Sikes: I am going to object on the same round as before, your Honor, that there must be me definition in this witness' mind as to what unsel means by "season" when he answers these estions, sir.

Mr. Margolis: I asked him whether, customarily, e period was known as the 1951 season. This is t my witness, your Honor, and I would like to it this way.

The Court: Overruled. He may answer.

The Witness: You are talking about an all year und tuna boat? [279]

Q. (By Mr. Margolis): Yes. The Pioneer was all year round tuna boat, was it not?

A. No, sir.

Q. It wasn't at that time? A. No, sir.

Q. Well, for an all year round tuna boat the ason is usually referred to as the season of 1951, 52, 1953 and so forth, isn't that right?

A. Yes.

Mr. Sikes: I am going to make my same objec-on, your Honor, except I have the further grounds at we are not talking now about the Pioneer but parently some other vessel. It is uncertain and gain dealing with a conflict of terms as to what meant by "season."

(Testimony of Joseph C. Mardesich.)

The Court: Please read the question, Mr. Re porter.

(Record read.)

The Court: The answer may stand. The objec tion is overruled.

Mr. Sikes: Sir, may I ask what the answer was

The Court: The answer was "yes."

Mr. Margolis: I think I have no further ques tions.

Mr. Sikes: And I have none, your Honor.

The Court: You may step down.

Mr. Sikes: The respondents also rest.

The Court: The libelant rests? Is there any re butttal, [280] Mr. Margolis?

Mr. Margolis: No. The libelant rests.

The Court: Both sides rest?

Mr. Sikes: Yes, sir. [281]

[Endorsed]: Filed August 10, 1955.

[Endorsed]: No. 14909. United States Court o Appeals for the Ninth Circuit. Marion Joncich, Jos eph C. Mardesich and Antonia Dogdanovich, Ap pellants, vs. Anthony Vitco, Appellee. Transcript o Record. Appeal from the United States Distric Court for the Southern District of California, Cen tral Division.

Filed: October 20, 1955.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals fo the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 14909

MARION JONCICH, JOSEPH C. MARDESICH,
ANTONIA DOGDANOVICH, Appellants,

vs.

ANTHONY VITCO, Appellee.

APPELLANT'S STATEMENT OF POINTS AND DESIGNATION OF RECORD

Appellants adopt as their points on appeal on which they intend to rely the Assignments of Error appearing in the transcript of the record of this case.

Appellants request that the record as certified to the Clerk of this United States Court of Appeals by the Clerk of the United States District Court, Southern District of California, be printed in its entirety.

Dated October 27, 1955.

/s/ ROBERT SIKES,
Proctor for Appellants

Affidavit of Service by Mail attached.

[Endorsed]: Filed Oct. 28, 1955. Paul P. O'Brien, Clerk.

No. 14909.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

MARION JONCICH, JOSEPH C. MARDESICH and ANTONIA DOGDANOVICH,

Appellants,

vs.

ANTHONY VITCO,

Appellee.

APPELLANTS' OPENING BRIEF.

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1 Norris' "The Law of Seamen," pp. 135, 136 1

No. 14909.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

MARION JONCICH, JOSEPH C. MARDESICH and ANTONIA DOGDANOVICH,

Appellants,

vs.

ANTHONY VITCO,

Appellee.

APPELLANTS' OPENING BRIEF.

Statement of the Pleadings and Facts Showing Jurisdiction.

There is no dispute about the jurisdiction of the District Court or of this court. This litigation arises out of an illness suffered by the libelant Vitco on board the vessel PIONEER while he was a fisherman on lays, the vessel being owned by appellants. The action in the District Court was by a libel *in personan.*

The admitted averments in the pleadings show that the causes of action set forth in the libel are within the admiralty and maritime jurisdiction of the District Court, pursuant to Article III, Section 2 of the United States Constitution and Title 28, United States Code, Section 1333. [T. R. pp. 6, 15.] The jurisdiction of this court to review the decree rests upon Title 28, United States Code, Section 1291, notice of appeal having been filed

within the time provided by Title 28, United States Code Section 2107.

In the libel Vitco brought action for: (a) $488.00 for medical service and care, (b) $5,552.00 for maintenance up to the date of filing the libel, April 5, 1954, (c) A full share of the catch of the PIONEER for the calendar year 1952. Appellants' answer denied liability to each of the above. Trial was had on February 23, 24 and 25, 1955. Appellants filed and served objections to the proposed Findings of Fact which objections were overruled without comment by the District Court. Thereafter, on May 21, 1955, the District Court issued its Findings of Fact and Conclusions of Law and on the same date issued its final decree in favor of the appellee for $135.00 for medical expenses, $5,834.00 for maintenance from January 29, 1952 to October 15, 1954, and $6,681.95, less appropriate withholding and social security tax deductions for Vitco's share of the catch, a total of $12,650.95 less said tax deductions, together with $141.65 costs.

Statement of the Case and Questions Involved.

The appellee Anthony Vitco, hereinafter referred to as Vitco, and the appellants Marion Joncich and Joseph C. Mardesich, hereinafter referred to as Joncich and Mardesich respectively, were all fishermen residing in the San Pedro area of Southern California.

Joncich, Mardesich and appellant Antonia Dogdanovich were the owners of the commercial fishing boat PIONEER of which Mardesich acted as master. On December 27, 1951 Vitco and Mardesich executed a contract (shipping articles) in writing [Resp. Ex. D] for a fishing voyage in Mexican waters. The voyage covered by the said contract began at San Pedro, California on December

27, 1951 and ended at the same port on February 25, 1952. [T. R. pp. 46, 226.]

While on said voyage, Vitco exhibited symptoms of an illness, left the vessel at Manzanillo, Mexico, on January 29, 1952 because of such illness, and was flown home at the owners' expense to San Pedro.

Vitco was examined by Dr. Murray Abowitz, on March 27, 1952, who diagnosed his condition being a coronary artery disease resulting from a myocardial infarction. Dr. Abowitz, on October 12, 1954, found that Vitco had reached a condition of maximum improvement in August, 1954. [T. R. p. 80.]

Vitco incurred an expense of $483.00 for medical service of which $348.00 was for doctors contacted on his own responsibility and $135.00 for a doctor to whom Vitco had been referred by the owners of the vessel.

At the time Vitco executed the shipping articles, he was a member of the fishermen's union, International Fishermen and Allied Workers of America, Local No. 33, which, at that time, had a valid and existing contract [Resp. Ex. B] with the owners of the PIONEER covering said vessel. [Supp. T. R. pp. 3 and 4.] Paragraph V of this union contract provided:

> "In event illness incapacitates any crew member from further work on board the vessel, he shall be entitled to receive his proportionate share of the earnings of the vessel to the date and hour said member leaves the boat. Upon regaining his health, he shall be reemployed on the boat. During illness, such member may be substituted for by another man. An ill member cannot demand his share while ashore. This paragraph does not pertain to a member injured on the boat."

This union contract also provided in a portion of paragraph XIV thereof as follows:

> "When crew members are hired, they are hired for the season and may be discharged only for good cause shown. For boats fishing tuna all-year-around, there shall be two tuna seasons within a year. One season commence on January 1st and end on the following June 30th, and the next tuna season shall commence on July 1st, and end on the following December 31st. When a boat arrives subsequent to the season termination date, the completion of the trip shall be deemed the end of the season."

The PIONEER, which was a tuna fishing boat, made as profit for each fishermen's net share the following sums for each of the trips pertinent to this case:

Trip ending February 25, 1952	Nil
Trip ending March 27, 1952	$1,161.13
Trip ending May 5, 1952	$1,150.09
Trip ending June 5, 1952	$1,501.52
Trip ending July 25, 1952	$1,401.17
Trip ending September 5, 1952	$1,156.63
Trip ending October 20, 1952	$311.41

[T. R. p. 226.]

The questions here involved:

1. Was Vitco entitled to maintenance for any period after August 31, 1954?

2. Was Vitco entitled to a share of the catches made by the PIONEER on voyages which began after February 25, 1952?

3. Was Vitco entitled to a share of the catches made by the PIONEER on voyages beginning after June 30, 1952?

Specification of Errors.

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Summary of Argument.

It is the appellants' contention that:

1. Vitco was not entitled to maintenance for any period after August 31, 1954, and that the trial court was in error in finding that he was entitled to such maintenance until October 15, 1954, for the reason that Vitco's condition became permanent and static in August, 1954.

2. Vitco was not entitled to any share of the fish catches of the PIONEER for the voyages which began after February 25, 1952, the date of termination of the voyage on which he became ill, for the reasons that:

a. His employment contract (the shipping articles) was for one fishing trip only, and,

b. The custom and practice was that a fisherman falling ill should receive only a share of the catch for the voyage on which he fell ill, and,

c. The union collective bargaining agreement [Resp. Ex. B] provided that a fisherman falling ill on board the vessel should be entitled to receive his share of the earnings only to the date and hour he left the vessel, and that he could not receive a share while ashore.

3. Or, in the alternative to 2 above, Vitco was not entitled to any share of the fish catches of the PIONEER for the voyages which began after June 30, 1952, for the reason that by the express terms of the said union agreement, the calendar fishing year was divided into two tuna "seasons," one beginning January 1st and ending June 30th, and the other beginning July 1st and ending December 31st; that said contract provided when crew members were hired, they were hired for the "season," which provision was followed by a description and definition of what "season" meant, that is, a six months period twice during the calendar year [Par. XIV of Resp. Ex. B]; and that the season for which Vitco was hired ended June 30, 1952.

ARGUMENT OF THE CASE.

Maintenance and Cure.

ASSIGNMENTS OF ERROR NUMBERS IV AND V.

IV.

"The District Court erred in finding that libelant was entitled to maintenance from January 29, 1952, until October 15, 1954, and that there was at the time of the making of the Findings of Fact and Conclusions of Law the sum of $5,834.00 due, owing and unpaid from respondents to libelant as and for maintenance."

V.

"The District Court erred in failing to find that libelant was entitled to maintenance, if any, from January 29, 1952, until August 1, 1954, and that there was due, owing and unpaid, if any, from respondents to libelant as and for maintenance, the sum of $5,484.00."

The sole reference in the testimony as to the date when Vitco's maximum cure had been attained was that of Dr. Murray Abowitz, as follows:

"Q. In your opinion does Mr. Vitco still suffer from a heart ailment? A. Yes, sir, he does.

Q. Is that a permanent condition? A. It is.

Q. Now, at what point, in your opinion, did he achieve the maximum improvement that you could give him, and did his condition become permanent or more or less static? A. I would estimate, roughly, that his condition stabilized and he achieved a maximum improvement in the late summer or early fall of 1954.

> Q. Is it possible, Doctor, to set a date when this sort of thing happens, or is that just not possible? A. It's very difficult. I would say approximately August of 1954." [T. R. pp. 79, 80.]

It is obvious that in October, 1954 Dr. Abowitz determined that Vitco's condition had become static in August, 1954.

It is not the date on which a doctor decides that at some prior time the patient reached the maximum cure, but the controlling factor, rather, is the date on which the seaman *in fact* reached the maximum cure.

In *Farrell v. United States,* 336 U. S. 511, at pages 518 and 519, the Supreme Court stated:

> "That the duty of the ship to maintain and care for the seaman after the end of the voyage only *until he was so far cured as possible,* seems to have been the doctrine of the American admiralty courts prior to the adoption of the Convention by Congress. . . . It has been rule of admiralty courts since the convention." (Emphasis added.)

The case at bar is not a case wherein the seaman was remaining away from work merely because he was under the care of a doctor. Vitco's condition was that of a heart ailment, permanent in condition [T. R. p. 79], and the trial court found that Vitco was totally disabled from January 29, 1952 to the time of the Findings of Fact. [T. R. p. 10.] There is no basis under the general maritime law for awarding a seaman maintenance for a period after which he, in fact, reached his maximum recovery,

under the *Farrell* case (*supra*) doctrine. It is conceivable, that if it were necessary for the seaman to forego employment for the purpose of waiting until the doctor could determine whether he had in fact reached the point of maximum cure, the court might feel that it would be unfair to the seaman to deprive him of work while he was waiting for such determination. However, this is not the present case, because the seaman was permanently disabled from work during all the period from January 29, 1952, up to the time of the trial. The only competent evidence on the determination of the date of the maximum recovery fixes it at some time in August, 1954, and, giving the appellee the benefit of every possible doubt as to the date, even though the burden of proof is his, he is not entitled to maintenance for any time after August 31, 1954.

To accept the fallacy of the libelant's contention that it is the date when the doctor makes his determination that at a previous time the maximum cure was reached, could result in clear absurdities. For example, if a permanently unfit-for-duty seaman were, five years after he reached his maximum cure, declared by a physician to have reached such cure five years previously, it is patent that a court would not award such seaman five years of maintenance when in fact his maximum cure had been reached five years before the determination.

Share of Catch; Libelant Not Entitled to Share of Catch for Any Voyage Beginning After February 25, 1952.

ASSIGNMENT OF ERROR NUMBERS VI, VII, VIII, X, XI, XII.

VI.

"The District Court erred in finding that libelant had been hired by respondents to serve aboard the said vessel during the full tuna season of the year 1952; the District Court further erred in finding that the libelant was entitled to a full share of the catch of said vessel during the full tuna season of the year 1952; and in finding that the amount due, owing and unpaid from respondents to libelant as and for his share of the tuna catch for the 1952 season of said vessel was $6,681.95, less taxes."

VII.

"The District Court erred in failing to find that libelant, pursuant to the provisions of Paragraph V of Exhibit 'D,' the collective bargaining agreement between libelant's Union and the respondents, the custom and practice involved, and the shipping articles in evidence, was entitled to no sum whatsoever as his share of the catch during the year 1952."

VIII.

"The District Court erred in failing to find, as an alternative to the error hereinabove next referred to, that the libelant was entitled only to a share of the catch for the first half of the year 1952 in an amount of $5,213.91, based on Paragraph XIV of said Exhibit 'D.'"

X.

"The District Court erred in finding that Paragraph V of the said collective bargaining agreement

is contrary to the established public policy of the maritime law to protect from impairment the seamans' historical right to maintenance and cure and to wages for the term of his employment."

XI.

"The District Court erred in failing to find that said Paragraph V of said collective bargaining agreement was at all pertinent times a valid subsisting and effective provision of said collective bargaining agreement and was binding on the libelant and the respondents."

XII.

"The District Court erred in concluding from the Findings of Fact that the libelant was entitled to judgment against respondents in the sum of $5,834.00 for maintenance, in concluding that libelant was entitled to judgment in the amount of $6,681.95, less taxes, for wages or share of the catch; and in concluding that libelant was entitled to judgment for his costs and disbursements therein." [T. R. pp. 19, 20, 21.]

It is agreed that a fisherman working on shares is a seaman and is, ordinarily, entitled to his share of the catch to the end of the voyage on which he was employed in the event that he becomes ill during such voyage and must leave the vessel.

The basic case with regard to wages to the end of the voyage, which in the case of fisherman is his share of the fish catch of that voyage, is in *The Osceola,* 189 U. S. 158 at page 175:

> "That the vessel and her owners are liable, in case a seaman falls sick . . . to his wages, at least so long as the voyage is continued."

Accordingly, to determine the length of time to which Vitco was entitled to receive share of catches of the PIONEER it is necessary to determine what the length of his employment was and whether it was for one voyage. This argument will deal with three points separately in this regard: the shipping articles, the custom and practice, and the collective bargaining agreement.

The Shipping Articles.

The shipping articles [Resp. Ex. D] constituted the contract of employment between the shipowner-captain and the seaman. (*The Seatrain New Orleans,* 127 F. 2d 878; *Aird v. Weyerhauser S.S. Co.,* 169 F. 2d 606.)

There is no question but that the libelant signed the shipping articles. [T. R. p. 231.] It is also true that fishermen on lays do not have to sign shipping articles before the Shipping Commissioner (Norris' Law of Seamen, Vol. 1, p. 104), and there appears to be no dispute as to the validity of the articles. These articles provide that the contract of employment shall be

> "from the Port of Los Angeles California to Mexican waters and such other ports and places in any part of the world as the Master may direct, and back to a final port of discharge in the United States, for a term of time not exceeding 12 calendar months." [Resp. Ex. D, p. 1.]

These shipping articles provided for a voyage not to exceed twelve (12) months, which would terminate when the vessel came back to a final port of discharge in the United States. The exact point of whether a seaman could recover wages just to the end of the voyage or for the entire twelve (12) months period set out in the articles, was decided definitely in the case of *Farrell v. United*

States, 336 U. S. 511, at pages 520 and 521. There the Supreme Court said:

> "We think . . . that it obligated the petitioner only for the voyage on which the ship was engaged when he signed on and that, when it terminated at a port of discharge in the United States, *he could not have been required to reimbark for a second voyage. The twelve month period appears as a limitation upon the duration of the voyage and not as a* stated period of employment." (Emphasis added.)

In order to determine what the "final port of discharge in the United States" was in the case at bar, the following definitions appear to be pertinent:

The port of discharge is the port at which the vessel is completely relieved of cargo and becomes ready for another venture. (*The Larimer,* 174 Fed. 429.) A final port of discharge is the last port of delivery where cargo is discharged or where some other act is done which has the effect of terminating the voyage. (*Schermacher v. Yates,* 57 Fed. 668; *United States v. Barker,* Fed. Case No. 14516; Norris, Law of Seamen, Vol. 1, pp. 135 and 136.)

At the end of each voyage, when a fishing vessel returns to San Pedro, the fish is unloaded and the various shares are paid to the fishermen before going out again on another trip. [T. R. pp. 258 and 259.]

Without question, there was a final port of discharge on February 25, 1952 [T. R. p. 226] when the voyage on which Vitco fell ill terminated, and under the contract of employment the employment itself had terminated thereby, and Vitco was not entitled to share in any catch of a voyage which began thereafter.

Custom and Practice.

In addition to the shipping articles, it was the custom and practice that a fisherman who became ill on a voyage and was unable to continue the voyage was paid only for that particular voyage. In this regard the appellant Mardesich gave the following testimony which was not contradicted:

> "Q. I see. Now, is there a custom and practice as to the payment of share of catches to fishermen who became ill on a voyage and are unable to continue the voyage?
>
> * * * * * * * *
>
> The Witness: Yes, sir.
>
> The Court: How long has that been the custom?
>
> The Witness: As far as I can remember. It's always been a custom if a man became ill on a certain voyage he received his share for that voyage." [T. R. pp. 257, 258.]
>
> * * * * * * * *
>
> "Q. Mr. Mardesich, now on this business of a custom to pay a man who becomes ill on a boat only for that particular voyage, how did you obtain your knowledge of that custom? What I mean is—well, let me make it a little more specific.
>
> Did you just learn that from the way the boats you were on operated, or did you learn that from conversation around or from some contracts? How did you learn that? A. I learned that from experience of my own and other boats." [T. R. p. 259.]

It appears that the language of this Honorable Court in the case of *Medina v. Erickson,* 1955 A. M. C. 2211,

decided in October, 1955, is particularly appropriate to the facts of the case at bar:

> "Because the articles did not with particularity state the duration of the intended voyage, and in the light of the prevailing custom to sign on for a voyage rather than for a fixed period, we hold that the twelve-month period is a limitation upon the duration of the voyage and not a stated period of employment . . . Erickson's employment having ended when the ALPHECCA completed the first voyage, the trial court erred in awarding . . . a sum equal to the chief engineer's share of the catch for the second and third trips of fishing vessel."

Therefore, it is respectfully submitted that in view of the shipping articles and the custom and practice involved, the lower court herein should not have awarded Vitco the share of the catch of any voyage after that which ended on February 25, 1952.

Collective Bargaining Agreement.

In addition to the shipping articles and custom and practice the provisions of the collective bargaining agreement [Resp. Ex. B, par. V] restrict Vitco to a share of the catch of only the voyage on which he fell ill. It was stipulated at the trial [Supp. T. R. pp. 3 and 4] that Respondents' Exhibit B, the contract between the International Fishermen and Allied Workers of America, Local No. 33, and the owners of the PIONEER, was in effect at all pertinent times, covering the vessel PIONEER, and that Vitco was a member of said union at all pertinent times. Paragraph V thereof reads as follows:

> "In event illness incapacitates any crew member from further work on board the vessel, he shall be

entitled to receive his proportionate share of the earnings of the vessel to the date and hour said member leaves the boat. Upon regaining his health, he shall be reemployed on the boat. During illness, such member may be substituted for by another man. An ill member cannot demand his share while ashore. This paragraph does not pertain to a member injured on the boat." [Resp. Ex. B.]

The trial court held that said paragraph V of said collective bargaining agreement was contrary to the established public policy of the Maritime Law. [T. R. p. 11.]

Before discussing public policy as applicable to this agreement, it might be well to ascertain from said agreement what the respective parties obtained as consideration therefrom. The union was recognized therein as the exclusive bargaining representative of all the employees covered by the agreement. [Par. I of Resp. Ex. B.] The members of the union, through their exclusive bargaining representative, received the following benefits from said contract:

1. The crew members of a fishing vessel could not be made to work more than six (6) days in preparing the vessel. [Par. III of said Ex. B.]

2. In the event that a crew member did not appear to help put away the gear and boat at the close of the season and was fined therefor, the fine-money, if no one took his place, was divided among the crew. [Par. IIIb of said Ex. B.]

3. The crew members had the right to limit the number in the crew and thus increase their shares, a right which ordinarily rests with the master of a vessel, that

is, the right to add more men to his crew. [Par. XIII of said Ex. B.]

4. When a crew member was hired, he was hired for the full six months season and could be discharged only for good cause shown. [Par. XIV of said Ex. B.]

5. When a member of the union was absent from his work because of union business, he would have his share continued while so absent. [Par. XVI of said Ex. B.]

6. When the fish was unloaded, the crew members would receive the assistance of six additional men to unload the tuna. [Par. XXIII of said Ex. B.]

7. The employer agreed therein to transfer disability insurance covering the crew members from the state plan to a plan administered by the union. [Par. XXIV of said Ex. B.]

There is, therefore, sufficient consideration for the execution of the contract herein involved, the basic law being, as here on each side, that there is sufficient consideration for a promise if the promisee foregoes some advantage or benefit or parts with a right. (*Louisville and N. R. Company v. Mottley,* 217 U. S. 467.) Obviously, in exchange for the restrictions contained in paragraph V of the agreement, the members of the union, said union being their exclusive bargaining representative, received a number of advantages and, without doubt, there was sufficient consideration on both sides to support this agreement.

This being so, the only attack made on the provisions of said paragraph V, is that of it being void as against public policy.

Just what is "public policy"? The Supreme Court of the United States in the case of *Steele v. Drummond*, 275 U. S. 199, stated as follows:

> "The meaning of the phrase 'public policy' is vague and variable; there are no fixed rules by which to determine what it is. It has never been defined by the courts, but has been left loose and free of definition . . ."

The act of a court in setting aside an agreement always conflicts with our ancient freedom to contract. In order for a court to be warranted in taking such action there must be present some danger or detriment to the public or some illegality of purpose. Detriment to the public interest, the basis of the doctrine of "public policy," will not be presumed where nothing sinister or improper is done or contemplated. (*Valdes v. Larrinaga,* 233 U. S. 705.) In this *Valdes* case, at page 709 thereof, Justice Holmes stated:

> "We discover nothing in the language . . . that necessarily imports or even persuasively suggests, any improper intent or dangerous tendency."

There must be some overwhelming public interest that will give a basis for the violation by a Court of the constitutional right of contract.

On this point the United States Supreme Court in *Steele v. Drummond,* 275 U. S. 199, stated:

> "It is only because of the dominant public interest that one, who has had the benefit of performance by the other party, is permitted to avoid his own obligation on the plea that the agreement is illegal. *And it is a matter of great public concern that freedom of contract be not lightly interfered with.*" (Emphasis added.)

It is strongly submitted that a court should not, except in the most extreme cases, interfere with freedom of contract so as to relieve one party of an obligation which he has entered into fairly and honestly. This principle is set out, as a warning, by the Supreme Court in the case of *Twin City Pipe Line Company v. Harding Glass Company,* 283 U. S. 353 at page 356:

> "The principle that contracts in contravention of public policy are not enforceable . . . *should be applied with caution* . . ." (Emphasis added.)

This case strongly upholds the principle that persons shall have the utmost liberty of contracting and their agreements, voluntary and fairly made, shall be held valid and enforced in the courts.

A very important quality of the doctrine of "public policy" is peculiarly applicable to seamen and their conditions. This quality of "public policy" is that it may change from generation to generation as changing political, economic and sociological changes are effected in our country. This inherent quality in the doctrine of "public policy" is set forth clearly by the United States Supreme Court in the case of *Patton v. United States,* 281 U. S. 276 at page 306, wherein the court states:

> "The truth is that the theory of public policy embodies a doctrine of vague and variable quality, and, unless deducible in the given circumstances from constitutional or statutory provisions, *should be accepted as the basis of a judicial determination, if at all, only with the utmost circumspection. The public policy of one generation may not, under changed condition, be the public policy of another.*" (Emphasis added.)

It is to be noted that in the case at bar there is no constitutional or statutory basis for the trial court's holding that said paragraph is void as against public policy.

A seaman, today, represented as he is by his union, is as well equipped, safeguarded, and assured of the protection of his rights as any other person in the United States.

To illustrate the difference between the economic and social condition of the seamen of several generations ago and the seamen of today, so as to determine whether the so-called public policy in existence at that time, if any, should be applied to litigation today, it might be well to review the description of the sailor of 1823 as given in the classic opinion of Justice Story in *Harden v. Gordon*, Fed. Case 6047, and compare it with that of today:

> "Seamen are by the peculiarity of their lives liable to sudden sickness from change of climate, exposure to perils, and exhausting labour. They are generally poor and friendless, and acquire habits of gross indulgence, carelessness, and improvidence. If some provision be not made for them in sickness at the expense of the ship, they must often in foreign ports suffer the accumulated evils of disease, and poverty, and sometimes perish from the want of suitable nourishment. Their common earnings in many instances are wholly inadequate to provide for the expenses of sickness; and if liable to be so applied, the great motives for good behavior might be ordinarily taken away by pledging their future as well as past wages for the redemption of the debt. In many voyages, particularly those to the West Indies, the whole wages are often insufficient to meet the expenses occasioned by the perilous diseases of those insalubrious climates."

In order for this Honorable Court to determine what "public policy" is as applied to the case at bar, it is suggested that this Honorable Court may take judicial notice of these facts: that today the American sailor has the best of food and living quarters, he works a 40-hour week with increased pay rates for any overtime he may voluntarily work; he is entitled to free medical care and cure at the United States Public Health Service; his wages cannot be attached or assigned; the unlicensed sailor earns from $550.00 to $900.00 per month, considerably more than the average worker and more than many professions, such as that of teacher; in addition, he has a position, as far as personal injury litigation is concerned, far superior to any other type of employee, that is, if he be injured on his vessel, he not only may recover what in effect is a type of workmen's compensation consisting of maintenance until he is cured or has reached maximum benefits plus the free medical facilities of the United States Public Health Service, but may, of course, pursue his personal injury action against his employer, not merely on the grounds of negligence, but for a species of liability without fault, unseaworthiness. In this regard, this Honorable Court may well take notice of the fact that the maritime unions have consistently opposed the extension of any type of workmen's compensation legislation to seamen for the obvious reasons that sailors now have in substance workmen's compensation benefits together with the right to sue their employers.

Ordinarily, these facts would not be pertinent in the type of action at bar, but where it is a question of public policy they are relevant in order for this Honorable Court to evaluate, in terms of public interest, the true status of the modern-day American sailor, so as to determine if

he may bargain collectively with his employer without doing violence to the public interest of legality and good morals. Too, since the law is a living thing and recognizes changes as they occur, the status of the maritime unions of today should be noted to add light on the question of whether public interest is offended by such collective bargaining, there not being any such unions in existence at the time of Justice Story's opinion above cited.

Accordingly, it is respectfully submitted that this Honorable Court should take further judicial notice of the fact that today the maritime unions are among the most powerful in the United States, fully capable of protecting themselves and their members in any type of economic struggle with the shipowners or anyone else. They have the power, if they so desire, to stop all shipping on any of the coasts of the United States. These facts are, today, self-evident. Thus, it does not appear well founded in logic or in fact to hold, particularly in view of the cautionary language of the United States Supreme Court as hereinabove cited, that Vitco, a seaman, acting through and being represented by his union, may not contract with regard to exchanging one type of benefit, that of wages to the end of his employment, for other advantages accruing to him as have been hereinbefore set out. This would appear particularly so where the advantage he is giving up is not some advantage based on humanity and welfare, such as would be maintenance and cure, but is simply his wages to end of the voyage. It is to be noted that under the contract in question in the case at bar, there is no giving up of his right to maintenance and cure. This contract was a purely mercenary contract on both sides motivated by the desire on the part of the

union members and the shipowners each to secure their best financial bargain. They reached an agreement whereby each party gave up some advantages and under the decisions of the United States Supreme Court above cited it is submitted that the decision of the trial court to declare the said paragraph V void as against public policy clearly ignores the actual conditions which exist in this decade of the twentieth century, and that such decision cannot be upheld on reason, right, law or equity, and clearly, without sufficient basis, interferes with the freedom of contract.

Share of Catch; Libelant Not Entitled to Share of Catch for Any Voyage Beginning After June 30, 1952.

ASSIGNMENT OF ERRORS NUMBERS VI, VIII, XII.

VI.

"The District Court erred in finding that libelant had been hired by respondents to serve aboard the said vessel during the full tuna season of the year 1952; the District Court further erred in finding that the libelant was entitled to a full share of the catch of said vessel during the full tuna season of the year 1952; and in finding that the amount due, owing and unpaid from respondents to libelant as and for his share of the tuna catch for the 1952 season of said vessel was $6,681.95, less taxes."

VIII.

"The District Court erred in failing to find, as an alternative to the error hereinabove next referred to, that the libelant was entitled only to a share of the catch for the first half of the year 1952 in an amount of $5,213.91, based on Paragraph XIV of said Exhibit 'D.'"

XII.

"The District Court erred in concluding from the Findings of Fact that the libelant was entitled to judgment against respondents in the sum of $5,834.00 for maintenance; in concluding that libelant was entitled to judgment in the amount of $6,681.95, less taxes, for wages or share of the catch; and in concluding that libelant was entitled to judgment for his costs and disbursements therein."

Paragraph XIV of the collective bargaining agreement [Resp. Ex. B] provides as follows:

"When crew members are hired, they are hired for the season and may be discharged only for good cause shown.

"For boats fishing tuna all-year-around, there shall be two tuna seasons within a year. One season shall commence on January 1st and end on the following June 30th, and the next season shall commence on July 1st, and end on the following December 31st. When a boat arrives subsequent to the season termination date, the completion of the trip shall be deemed the end of the season . . ."

It is of great importance that this provision in the collective bargaining agreement does *not* prohibit or in any way hamper a seaman from obtaining his wages (share of catch) to the end of the voyage or until the end of his term of employment. This paragraph XIV does, however, set forth distinctly what the term of the employment shall be. This is a very important distinction between paragraph V (of the collective bargaining agreement) and paragraph XIV, the former providing that the fisherman shall receive his share of the catch only to the time he leaves the vessel, while the latter, as stated

above, sets out how long the period of employment shall be.

It is to be noted that the trial court did not declare said paragraph XIV void as against public policy, the only reference to the collective bargaining agreement to be found in the findings of fact sets out that the collective bargaining agreement was in full force and effect at the time that the contract of employment was entered into between the libelant and the respondents, that the union represented the fishermen including the libelant, and that *paragraph V* thereof is contrary to public policy. [Finding of Fact No. 10, T. R. pp. 10 and 11.]

There is nothing ambiguous or uncertain about the wording of said paragraph XIV which, in its essence, merely repeats the maritime law that when crew members are hired they are hired for the season and then defines, by dates, the two seasons in each calendar year. The first season ran from January 1st through June 30th and the second season began on July 1st and ended on December 31st. The said paragraph XIV also provides that when a vessel returns home after the end of the calendar season, that said season shall be extended to the completion of the said trip. The total value of a share of each of the five (5) trips made by the PIONEER from the time Vitco began the voyage on which he fell ill to the end of the first season (including the last trip which ended July 25, 1952, but which began prior to June 30, 1952, and thus is included in the first season of the calendar year 1952) is $5,213.91. [T. R. p. 226.] However, the trial court awarded Vitco a share of the catch of the trips ending September 5, 1952 and October 20, 1952, both of which began after June 30th of 1952, in a total additional amount of $1,468.04. [T. R. p. 226.]

The only evidence concerning Vitco's averment that he was hired for one year, is the testimony of Vitco as follows:

> "Q. You had worked with Mr. Joncich on the Pioneer before? A. About two years before, yes, sir. He asked me if I would want to go fishing tuna this year with him. I told him no, I didn't want to go.
>
> Well, he says, 'Where you going?'
>
> I told him, 'I might go to San Diego, fish on Normandy.' Because I did fish on Normandy one trip before.
>
> He says, 'Why you want to go to San Diego? You know you can make $10,000 with me this year. I'm going with you guys, too.' And talk and talk and talk, and finally I say yes and I accepted." [T. R. pp. 44 and 45.]

There does not appear in said evidence any contract of employment, particularly with regard to the length thereof. The only mention of time at all is that Joncich is alleged to have said "you know you can make $10,000 with me this year." This statement means no more than that Vitco, if he remained on the vessel during the calendar year 1952, could make $10,000.00. To read into this testimony a contract of employment for one year, particularly in view of the libelant's burden of proof and the collective bargaining agreement, seems unreasonable, unsound and not supported by the evidence.

There is a further fatal defect in the alleged oral contract of hire, and that is that it is obvious that since the trial court found that the collective bargaining agreement was in existence at the time that Vitco and Joncich entered into the so-called contract of employment [Find-

ing of Fact No. 10, T. R. pp. 10 and 11], there was no consideration passing from Vitco to Joncich in exchange for Joncich allegedly agreeing to hire Vitco for an entire year, Vitco and Joncich already being bound by the collective bargaining agreement as to the times and durations of employment as set out in paragraph XIV thereof. In this regard, it might be pertinent to quote from the opinion of Judge A. N. Hand in the case of *Foreman v. Benas and Company,* 247 Fed. 133, a case in which the contract of employment was the shipping articles, as distinct from union bargaining agreements, but the principle thereof being the same, when speaking of certain representations made by the owners to the seamen:

> "If the representations were made before the articles were signed, they are merged in the articles; and *if made later they were of no effect because without consideration.*"

Therefore, it is respectfully urged that not only was there no evidence adduced at the trial by which Vitco could sustain his burden of proof that there was an oral contract for a hiring period of one year, but assuming, *arguendo,* that such did exist, it was inferior to the collective bargaining agreement, could not be considered to explain any ambiguity in the collective bargaining agreement, for such ambiguity did not exist, and furthermore was entirely without consideration.

Even in the event that the trial court was justified in awarding Vitco a share of any of the voyages after that ending February 25, 1952, which appellants strongly deny, it seems patent that under no theory whatsoever could the trial court award Vitco any amount for the share of catches in excess of $5,213.91, said sum being the total

amount of a share for the voyages including the one ending July 25, 1952, *i.e.,* for the first six-months season as set out in the collective bargaining agreement.

Conclusion.

It is respectfully urged by appellants as follows:

1. That appellee is not entitled to any maintenance for any period after August 31, 1954, and that the judgment in the amount of $5,834.00 for maintenance should be decreased by forty-five (45) days or $270.00.

2. That on each of the following three bases separately, and all three, jointly, the appellee should be limited to his share of the catch of the first voyage which ended February 25, 1952, and on which he fell ill, said voyage having resulted in a net loss, and is entitled to nothing insofar as his share of the catch for the balance of 1952 is concerned:

   a. The shipping articles,
   b. The custom and practice,
   c. Paragraph V of the collective bargaining agreement.

3. That, in any event, appellee is not entitled to any share of the catch in excess of $5,213.91 under the terms and provisions of paragraph XIV of the collective bargaining agreement, neither said paragraph nor said agreement having been attacked or voided in any way by the appellee or by the trial court, and that the judgment for said shares in the amount of $6,681.95 should be reduced to said $5,213.91.

Respectfully submitted,

ROBERT SIKES,

Proctor for Appellants.

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No. 14909

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

MARION JONCICH, JOSEPH C. MARDESICH and ANTONIA DOGDANOVICH,

Appellants,

vs.

ANTHONY VITCO,

Appellee.

APPELLEE'S BRIEF.

Statement Re Jurisdiction.

The proceedings herein are founded upon a seaman's libel *in personam* for maintenance, cure and share of the catch filed on the Admiralty side of the Court in the United States District Court for the Southern District of California, Central Division. The issues tried were formulated by the Second Amended Libel [Tr. 3-7] and the Answer thereto [Tr. 12-16]. Said action for maintenance, cure and share of the catch is within the Admiralty and Maritime jurisdiction of the District Court pursuant to Article III, section 2, of the United States Constitution and 28 U. S. C., section 1333 [Tr. 6, 15].

This Court has jurisdiction to hear this appeal under 28 U. S. C., section 1291.

Statement of the Case.

The allegations in the Second Amended Libel and the Answer thereto material to this appeal are as follows:

Respondents are and were the owners and operators of the fishing vessel PIONEER. Libelant was a fisherman who was employed by the respondent as a member of the crew of said vessel at wages in the form of a share of the proceeds of the catch thereof, "pursuant to an oral agreement of hiring for the period of the tuna fishing season of the year 1952" [Par. III, Second Amended Libel, Tr. 4]. While so employed libelant fell ill of a heart condition and was forced to leave the vessel on this account. He was thereafter continuously disabled and in need of and obtaining medical care and cure up to the time of the filing of the libel. At the time of the filing of the libel on April 5, 1954, there was due and unpaid to libelant from respondents the sum of $5,552.00 for maintenance. In addition, it was alleged that libelant was entitled to a full share of the catch of said vessel PIONEER for the 1952 tuna fishing season and an accounting with respect thereto was requested. Respondents' answer admitted ownership of the PIONEER and admitted *that respondent had hired libelant for the tuna fishing season of the year 1952* [Par. II of Answer, Tr. 12]. It was admitted that libelant left the vessel on January 29, 1952. On lack of information and belief libelant's illness and the nature thereof and the allegations concerning the amount of maintenance due and the right to receive a share of the catch were denied. It was affirmatively alleged that the oral contract of employment provided that libelant would not be entitled to a share of the catch if he fell ill and that under such circumstances he would not be entitled to such share under the prevailing custom [Tr. 12-15].

On all of the matters referred to above the court found that libelant's allegations were true and that respondents' denial and affirmative allegations were untrue. It was found that libelant was entitled to maintenance at the "agreed rate of $6.00 per day from the time the illness impelled him to leave the vessel on January 29, 1952 until October 15, 1954 when libelant's physician reasonably and in good faith determined for the first time that libelant had reached the state of maximum possible recovery in August 1954" [Tr. 11].

The court found that libelant was entitled to $5,834.00 in maintenance and $6,681.95 as his share of the catch minus the deductions required by law from the latter. The court also found that it was true that at the time in question here there was a collective bargaining agreement in effect covering the PIONEER which contained a clause providing that a fisherman who fell ill in the service of the vessel should receive compensation only up until the time that he left the vessel and that this clause is "contrary to the established public policy of the maritime law to protect from impairment the seaman's historical right to maintenance and cure and to wages for the term of his employment" [Tr. 7-12].

Evidence to the following effect was introduced. Fishermen, like the libelant here, are employed upon the basis of a share of the catch. The food consumed by the crew is paid for by them out of their earnings [Tr. 44]. It is the custom for fishermen to prepare the boats and the nets for fishing before the beginning of each season. On all year round tuna boats such as the PIONEER this was done once a year, generally before Christmas. The time consumed in the preparation of the boat for fishing

is from one to two months depending on what work is required. The fishermen receive no compensation for this work and even have to pay for the food consumed aboard the vessel while this work is being performed. On the all year round tuna boats like the PIONEER, except when the boat is laid up once a year for general maintenance work by the crew as described above, the boat fishes all year round absent engine trouble or something of that kind which prevents fishing [Tr. 39-42, 272-3]. One of the respondents, the master of the PIONEER, conceded that on all year round tuna boats the season is considered as the entire fishing year which starts in December or January and ends in September, October or November [Tr. 273]. The evidence is uncontroverted that it is the custom on all year round tuna boats to hire fishermen for a season constituting a full year of fishing [Tr. 43]; that on the first trip of the year either in December or January the crew members sign Shipping Articles; and that they sign no other articles that year no matter how many trips are made. On the following year on the first trip new articles are signed which continue in effect for the entire year [Tr. 46-8, 254-5].

Late in 1951 libelant was approached by one of the respondents and asked to go tuna fishing "this year" with respondents on the PIONEER. Libelant indicated that he was considering employment on some other boat and the respondents then urged him to come on the PIONEER saying, "You can make $10,000 this year" [Tr. 45]. Libelant accepted the employment and started work in early November on the PIONEER getting the boat ready for fishing. He worked more than one month in this preparatory operation working seven days a week [Tr. 45-6]. Libelant's heart attack occurred during the first

trip of the vessel on which the boat made no earnings at all. As a matter of fact, the members of the crew were in debt for the cost of the food [Tr. 226-7].

After the work on preparing the vessel for fishing had been completed and when the vessel was about to depart on its first trip, libelant and other members of the crew signed Shipping Articles on December 27, 1951 [Ex. D, 231-2]. These articles were prepared by the broker who was hired by the captain of the vessel [Tr. 257, 268-9]. Libelant never read the articles nor was he ever informed of what they contained [Tr. 252]. The respondent, who was Master of the vessel, also signed the articles without reading them and didn't recall any member of the crew reading the articles [Tr. 269]. The Shipping Articles referred to employment of the fishermen on the PIONEER "now bound from the Port[1] of Los Angeles, California, to Mexican waters *and such other ports and places in any part of the world as the master may direct,* and back to a final port of discharge in the United States *for a term not exceeding twelve calendar months.*[2]" (Emphasis added.) Boats like the PIONEER averaged approximately thirty days on trips to Mexico. A trip which lasts seventy days is extraordinarily long and trips never last a year [Tr. 267-8].

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[1]"Here the voyage is to be described, and the places named at which the ship is to touch; or, if that cannot be done, the general nature and *probable length of the voyage is to be stated,* and the port or country at which the voyage is to terminate." (Emphasis added.)

[2]"If these words are not necessary, they must be stricken out."

The collective bargaining agreement in effect at the time covering the vessel and its crew contained a paragraph reading as follows:

> "In the event illness incapacitates any crew member from further work aboard the vessel, he shall be entitled to receive his proportionate share of the earnings of the vessel to the date and hour said member leaves the boat. Upon regaining his health he shall be reemployed on the boat. During illness, such member may be substituted for by another man. A new member cannot demand his share while ashore. This paragraph does not pertain to a member injured on the boat." [Ex. B, Supp. Tr. 3 and 4.]

However, respondents' testimony was to the effect that this paragraph of the agreement was not followed but that the custom was that when men fell sick on a voyage that they receive their share for the entire voyage, not just up to the time that they ceased working [Tr. 257-8]. Also the same custom applies to men injured aboard a vessel [Tr. 260-1].

Paragraph XIV of the aforesaid collective bargaining agreement provides that crew members are hired for the season, during which they may not be discharged without good cause, and that all year round tuna boats shall have two seasons, the first of which ends on June 30 [Ex. B, Supp. Tr. 3-4].

As a result of his heart attack libelant required medical care and rest and was unable to work but his condition continued to improve until it became stabilized about August, 1954. The fact that the condition became stabilized at that time could not be determined in August but had to await a subsequent examination which revealed that libelant's condition remained substantially unchanged for

some time. The fact that the condition had become stabilized in August, 1954, was first determined by the doctor on October 12, 1954 [Tr. 79-80].

Except for ordinary layovers for a few days between trips and one longer layover because of mechanical trouble, the PIONEER fished continuously from December, 1951 (when it left on its first trip for the 1952 season) until September of 1952 (up until which time the trial court allowed libelant to recover for a share of the catch) when the boat ceased fishing for the season. Paragraph III(b) of the collective bargaining agreement referred to above [Resp. Ex. B, Supp. Tr. 3 and 4] reads as follows:

> "At the close of the fishing season the crew shall wash the boats, strip the nets, and put away the gear within three days after the fishing season is over or when the boat arrives in port, weather permitting."

The work described in this paragraph was done at the end of the season in September of 1952 but was not done at any time between the first trip, beginning in December 1951, and the last trip ending in September, 1952 [Tr. 261-5]. In this respect the respondents followed the usual practice prevailing on all year round tuna boats to have only one season a year and to lay up the boats only at the end of the season, at which time the aforesaid work described in paragraph III(b) of the collective bargaining agreement was done [Tr. 271-2].

On the basis of these facts the appellants contend that appellee was not entitled to a share of the catch resulting from any trip after the one on which he fell ill because his admiralty right thereto had been bargained away by the union under its collective bargaining agreement; that in any event appellee was not entitled to a share of the

catch on voyages beginning after June 30, 1952, because of the collective bargaining agreement provision dividing the year for all around tuna boats into two seasons; and that appellee was not entitled to maintenance for any period after August 30, 1954, because his condition became stationary at that time and it is immaterial that this fact could not have been determined until September 12 of the same year. The trial court's rulings to the contrary and appellee's contention that the trial court was correct pose the issues to be determined on his appeal.

Summary of Argument.

1. Wages to the end of the period of the seaman's employment, together with maintenance and cure, when a seaman is forced to leave his employment by reason of either illness or injury is a right created by Admiralty Law. Wages, maintenance and cure are all separate elements of a single right designed to afford a measure of security to seamen who are injured or fall ill while in the service of their ship. The rights and obligations with respect to wages, maintenance and cure become part of every maritime agreement of hire not by reason of the meeting of the minds of the parties with respect thereto, but solely by operation of law. These rights are not created by contract and they cannot be negated by contract whether it be the individual contract of the seaman or that of his collective bargaining agent or the creation of a custom claimed to be part of either contract. These admiralty rights flow from the Constitution's adoption of the principles of Admiralty Law, which can be modified by the action of no individual, group of individuals or custom. Accordingly the provision of the collective bargaining agreement purporting to deprive fisher-

men of their right to wages to the end of the period of employment when they fall ill in the service of the ship is void and cannot be enforced.

2. Regardless of how the collective bargaining agreement is construed, it does not prohibit and is not inconsistent with a boatowner's agreement to employ a fisherman for an entire year, regardless of whether that year be deemed two seasons under the contract. It is admitted by the pleadings and the undenied evidence is that libelant was hired for the entire year of 1952. So, too, the uncontradicted evidence is that the custom on all year round tuna boats is to employ fishermen for the entire fishing year. This custom violates neither any provisions of law nor of the collective bargaining agreement. The Shipping Articles signed by libelant are not inconsistent with the oral contract and custom described above and in fact, reasonably construed under all of the circumstances of this case, including, particularly, the fact that only one set of shipping articles are signed each year, supports the finding that the hiring was for the 1952 year of fishing. Finally, the collective bargaining agreement itself is ambiguous with respect to the question of seasons for all year round tuna boats as we shall show in the argument and does not support appellants' assertion that the fishing season necessarily ended on June 30, 1952. Even if it did, however, the agreement to employ for the entire year is perfectly valid and is controlling here.

3. Under established authority maintenance may be allowed until the maximum cure is obtained and for a reasonable time thereafter. In addition, cure is not maximum until that fact is ascertained by the treating doctor. Under either of the foregoing propositions the trial court properly allowed maintenance until September 15, 1954.

ARGUMENT.

I.

The Trial Court Correctly Ruled That the Collective Bargaining Agreement, Insofar as It Purported to Deprive Appellee of His Admiralty Right to Wages to the End of His Period of Employment, Is Contrary to the Admiralty Law and Is Void.

A seaman's right to maintenance and cure and wages to the end of the voyage or period of employment arise out of admiralty and maritime law. Such wages are a part of and are not separable from maintenance and cure. *The Hawaiian,* 33 Fed. Supp. 985 (D. C., D. Md., 1940); *Warren v. United States,* 75 Fed. Supp. 836 (D. C., D. Mass., 1948); *Pacific Steamship Co. v. Peterson,* 278 U. S. 130; *Enochasson v. Freeport Sulphur Co.,* 7 F. 2d 674, 675 (D. C., S. D., 1925); *Pacific Mail S.S. Co. v. Lucas,* 264 Fed. 938 (C. A. 9, 1920); *Great Lakes S.S. Co. v. Geiger,* 261 Fed. 275 (C. A. 6, 1919). It has been held in this circuit that the same rules of law apply to eligibility for wages to the end of the period of employment as are applicable to maintenance and cure. *Pacific Mail S.S. Co. v. Lucas,* 264 Fed. 938, 941 (C. A. 9); see also, *Ward v. American President Lines,* 95 Fed. Supp. 609, 677 (D. C., N. D. Cal., 1951). "The expenses of maintenance and cure would be regarded as a mere incident to the wages for which there is undoubtedly a privilege." *The Osceola,* 189 U. S. 158, 170. The seaman's right to maintenance, cure and wages are "grounded solely upon the benefit which the ship derives from his service." The court goes on to say that this right is one "implied in law as a contractual obligation arising out of the nature of the employment. *Pacific S.S. Co. v. Peterson, supra,* 278 U. S. 130, 137-8. The fact

that the right to maintenance, cure and wages does not depend upon the agreement or intent of the parties is further manifested by the fact that the ship is liable therefor even though it is not a party to the contract of employment. *The Edward Pierce,* 28 Fed. Supp. 637; *The Montezuma,* 19 F. 2d 355, 356 (C. A. 2).

It is a general principle of admiralty and maritime law that agreements which tend to deprive a seaman of his rights under that law will be declared void. Thus in *The Cypress,* 6 Fed. Cases 1104, No. 3530, a provision in the articles that the seamen would not sue for their wages for three months after the voyage ended was held void under general principles of admiralty law. It has also been held that a seaman cannot by the form of the charter be deprived of his admiralty lien on the vessel for wages. *The General J. A. Dumont,* 158 Fed. 312 (D. C., E. D. Va., 1907). Similarly, a seaman's right to participate in salvage proceeds in exchange for an extra month's wages has been held invalid. *Conekin v. Lockwood,* 231 Fed. 541 (D. C., E. D. S. C., 1916). The District Court for the Northern District of California (Judge Goodman) has held that where an admiralty contract provides for dismissal pay the maritime lien for those dismissal wages cannot be waived by agreement. The right to the lien is not created by voluntary agreement by the owner and the seaman and therefore "it cannot be contractually waived." "In maritime law a contract may fix the term of service, the nature of the service, and the amount of compensation. The amount earned for services rendered pursuant thereto, by law, automatically becomes a lien . . ." *Gaynor v. The New Orleans,* 54 Fed. Supp. 25. So too the right to wages to the end of the period of employment is not created by the agree-

ment of the parties but automatically comes into effect after the parties have contracted with respect to the term of the service and the amount of compensation.

In the case of *Cortes v. Baltimore Insular Line,* 287 U. S. 367, 371, the court, speaking of maintenance and cure of which wages to the end of employment is an inseparable part, said: "Contractual it is in the sense that it has its source in a relation which is contractual in origin, but given the relation, no agreement is competent to abrogate the incident. . . . We think the origin of the duty is consistent with a remedy in tort, since the wrong, if a violation of a contract, is also something more. The duty, as already pointed out, is one annexed by law to a relation, and annexed as an inseparable incident without heed to any expression of the will of the contracting parties." It is this inseparable incident attached to the agreement of hire without heed to any expression of the will of the contracting parties that the appellants' claim has been contracted away by the collective bargaining agent of appellee. See also *Harden v. Gordon,* Fed. Case 6047; *DeZon v. American President Lines,* 318 U. S. 660, 667; *Freeman v. Baker,* Fed. Case 5084; *Venides v. United Greek Shipowners Corp.,* 168 F. 2d 681 (C. A. 2, 1948); *Glandzis v. Callinicos,* 140 F. 2d 111 (C. A. 2, 1944); *Lakos v. Saliaris,* 116 F. 2d 440, 444 (C. A. 4, 1940).

This right which appellants contend can be waived by the contract of a collective bargaining representative flows from the Constitution of the United States. Article III, Section 2, of that Constitution adopts as the law of the land the principles of admiralty and maritime law and requires that those principles be enforced by the courts

of the United States. *O'Donnell v. Great Lakes Dredge & Dock Co.,* 318 U. S. 36, 40 *et seq.* In the commentary on maritime workers appearing in Title 46 of United States Code Annotated and beginning at page 211 thereon, it is stated specifically with respect to the right to maintenance, cure and wages at page 214: "These rights and the enforcement of them in admiralty were preserved to the seamen by the Constitution. His remedy was enlarged by the 'saving to suitors' clause of the Judicial Code (Pars. 24, 256. 28 U. S. C. A., Pars. 41(3), 371), to give him at his election the right to sue the owner of the vessel in a common law with the right of trial by jury." Rights of seamen, whether created by admiralty and maritime law or by statute, cannot be cancelled out by private agreement. *McCarthy v. Steam-Propeller City of New Bedford,* 4 Fed. 818; *Lakos v. Saliaris, supra,* 116 F. 2d 440, 443; *The San Marcos,* 27 Fed. 567 (D. C., S. D., N. Y., 1886).

A collective bargaining agent has no greater power in this regard than the seaman himself. As Judge Mathes stated in his opinion below:

> "If then the seaman himself is powerless, for reasons of public policy, to part with his right to wages, the union as collective bargaining agent *a fortiori* is powerless so to do (see *Brotherhood of Railroad Trainmen v. Howard,* 343 U. S. 768, 773-774 (1952); *Wallace Corp. v. Labor Board,* 323 U. S. 248 (1944); *Ahlquist v. Alaska-Portland Packers' Association,* 39 F. 2d 348 (C. A. 9, 1930))."

If appellants' argument were correct that a collective bargaining agent could bargain away admiralty or statutory rights for consideration then all right to maintenance and cure could be bargained away as well as the right

for wages to the end of the period of employment. So could the right to Workmen's Compensation, the right to recover under the Jones' Act, the right to the payment of minimum wages provided by law, etc. Thus the purpose of the law to establish uniform safeguards for all in a particular classification—not safeguards which can be bargained away for other benefits which a union happens to prefer—would be nullified. The argument that the public would suffer no detriment from such lack of uniformity is totally without merit. One purpose of such legislation and principles of admiralty and maritime law is to protect seamen and others against becoming public charges. Taking away this protection is certainly against the public interest.

Finally, without any authority to support the proposition appellants argue that ancient principles of maritime law should be modified by judicial action. Factually this argument disregards the reality that seamen and fishermen are still subjected to risks arising from "the peculiarity of their lives, liability to sudden sickness from change of climate, exposure to perils, and exhausting labor." *Harden v. Gordon,* Fed. Case No. 6047 (cited by appellants as setting forth a statement of conditions which have now changed). Fishermen are still tied to their vessels particularly when at sea. Fishing vessels still sink and this quite frequently. Fishermen are still subject to the absolute commands of their masters. In addition, they labor part of the time for nothing in the hope of obtaining earnings when they go fishing, a risk so far as compensation goes which is beyond that of the average seaman.

Finally, however, and most important on this point is the fact that appellants are asking this Court to overrule

the Supreme Court of the United States. In the present period with all of the conditions of seamen substantially the same as they are today, the Supreme Court held that seamen are wards of admiralty and are to be treated with respect to contracts like beneficiaries are with respect to fiduciaries requiring the latter to affirmatively show that no advantage had been taken over the former. Said the court, "The law (on maintenance and cure) is to be liberally construed to carry out its full purpose which is to enlarge admiralty protection to its wards." *Garrett v. Moore-McCormack, Co.,* 317 U. S. 239.

The appellants would have this Court diminish the admiralty protection extended to fishermen as seamen. The refusal of the court below to do this and its declaration that a contract clause purporting to deprive a seaman of his right to wages to the end of the period of employment is void is patently correct and should be affirmed.

II.

The Court Below Correctly Ruled That Petitioner Was Hired for the Entire Fishing Year of 1952 and Was Entitled to His Share of the Catch for That Entire Year.

As is noted in the Statement of the Case the complaint alleged that the agreement of hire was for the year. This was admitted in the answer and found to be true by the trial court. If it is possible at all for appellants to have a judgment based on such a record reversed is questionable. If it is possible the burden on the appellant is indeed a heavy one.

Appellants rely upon a clause in the collective bargaining agreement which provides that all year round tuna boats shall have two seasons, and that crew members are

hired for the season and may be discharged only for good cause shown. This clause of the collective bargaining agreement, however, must be construed together with another clause dealing with the same subject and providing that at the end of the season certain functions shall be performed by the crew. In this case admittedly those functions were not performed until the boat stopped fishing in September of 1952. By their own conduct appellants did not choose to treat the end of the six-month period as the end of the season and therefore they are hardly in a position to contend that the season ended at the end of the six months simply because appellants had a right to have it end at that time if they had chosen that course.

Much more important, however, is the fact that the collective bargaining agreement does not prohibit hiring for the entire year and such hiring is in no way a violation of the collective bargaining agreement. As a matter of fact, the record shows without contradiction and out of the mouths of respondents themselves that the uniform custom on year round tuna boats was to treat the entire year as the season and to hire fishermen for the entire year. That such a custom, when as here it is legal, becomes a part of the contract between the parties is established law. *Robinson v. United States,* 13 Wall. 363; *Shipman v. Straitsville etc.,* 158 U. S. 356. This principle has been applied to maritime contracts. *Hostetter v. Park,* 137 U. S. 30.

Moreover, the only period of time referred to in the conversation which led to the hiring of appellee by appellants was a year. There was no reference to a season. This uncontradicted evidence was ample to support a finding of an oral contract to employ appellee for a period

of one year. This contract in no way violated the collective bargaining agreement.

Appellants placed great stress upon the shipping articles as supporting their position that the contract was for a single voyage. Thus they place themselves in the position of arguing that the shipping articles control over the collective bargaining agreement while in other respects they themselves rely on the collective bargaining agreement as establishing the terms and conditions of employment between the parties. It is submitted that the correct principle to be applied here is that the shipping articles cannot deprive the fisherman of his right under that collective bargaining agreement to a minimum period of employment of six months or to the end of the season which in this case turned out to be the entire year. However, there is no reason why the shipping articles cannot apply for a longer period of time than the minimum period of employment guaranteed by the collective bargaining agreement because such longer periods of employment is not inconsistent with the minimum guarantee secured by collective bargaining. *Cf. Warren v. United States, supra,* 75 Fed. Supp. at 839.

In any event the shipping articles properly construed supports the position of appellee, not that of appellants. It is elementary that having been prepared by an agent of appellants they must be construed strictly against appellants. In addition, they should be liberally construed in order to accomplish the purpose the parties had in mind, *United States v. Westwood,* 266 Fed. 696, 697 (C. A. 4, 1920), particularly with respect to the maritime rights of seamen, *Garrett v. Moore-McCormack, supra,* 317 U. S. 239.

The fact that shipping articles are signed only once a year instead of each trip is a strong indication of the fact that the shipping articles are intended to cover the year and not the trip. There is no other explanation for this undenied practice. Looking at the shipping articles themselves it will be observed that in a section which on the face of the articles is designed to indicate the "probable length of the voyage," with the warning that the probable length of the voyage should not be indicated if the words are not necessary, the shipping articles specify "a term not exceeding twelve calendar months." The undisputed evidence is that the average trip to Mexico is 30 days, a very, very long trip is 70 days and it is inconceivable that a trip would take 12 calendar months. If the articles were truly intended to cover only one trip then the period set forth would not conceivably be 12 calendar months. However, that 12-months period is entirely consistent with the customary hiring of fishermen employed on all year round tuna boats for the entire fishing year.

Even if the articles in this case were construed as to apply to only a single trip that would have no effect on the period of employment under the facts and circumstances of this case. Shipping articles are not intended to forbid or prevent parties from establishing and maintaining a continuing relationship beyond the period prescribed in any particular set of such articles. Their purpose is to protect the seaman, not to limit his right to protect himself beyond the period of the articles; where by oral agreement or custom the term of employment extends beyond the period prescribed in the shipping articles, the oral agreement or custom will prevail, not the shipping articles. *N. L. R. B. v. Waterman S.S. Co.,*

309 U. S. 206, 218. See also *Southern S.S. Co. v. N. L. R. B.,* 316 U. S. 31, 37-8, where the court said: "The terms of employment must be determined in the light of all the evidence concerning petitioner's employment customs and practices." From early times it has been held that proof of an oral agreement binding on the parties and extending beyond the period of employment provided for in shipping articles is admissible and that the oral agreement is binding on the parties. *The Cypress,* Fed. Case 3530; *Page v. Sheffield,* Fed. Case 10,667.

In the case of *Farrell v. United States,* 336 U. S. 511, relied on by respondents it was held that *under the facts of that case* the shipping articles were intended to cover a single voyage and the time limitation set forth in the articles referred to the duration of that voyage rather than to a stated period of employment. However, the court pointed out: "It is not questioned that the general custom on ships, other than the coastwide trade, is to sign for a voyage rather than for a fixed period." It was in the light of this custom that the finding with respect to the meaning of the articles in that case was made. Here, however, the uncontradicted evidence is that there is a custom to employ for the year, thus under the cited case, requiring the construction given the articles by the trial court. Moreover, in the cited case there was no proof of an oral agreement or of a collective bargaining agreement providing for employment for a minimum period of six months, nor was there evidence of a practice to use a single set of articles to cover all of the voyages made during an entire year of operation. The decision in this case is entirely consistent with and is in fact supported by that in the *Farrell* case.

Finally, the appellants rely on the case of *Medina v. Erickson,* ..... F. 2d ..... (1955 A. M. C. 2211), decided by this Court on October 19, 1955. This case it is respectfully submitted is determinative of the issue here in favor of appellee. The *Medina* case cites and relies upon *Luksich v. Misetich,* 140 F. 2d 812 (C. A. 9, 1944), holding that oral arrangements between the parties were admissible to show a duration of employment not consistent with the specific terms of the shipping articles. Following that precedent the court looked beyond the specific terms of the shipping articles involved in the *Medina* case in order to determine the period of employment covered by them. In that case the evidence established that there was a custom in San Diego that seamen including chief engineers by signing articles of the kind involved there bound themselves for only one voyage and that on each separate voyage separate articles were always signed. Upon this basis it was held that the time period set forth in the articles was a limitation upon the duration of the voyage and not a stated period of employment.[3] Thus the *Medina* case is authority for the proposition that in construing the meaning of the articles, it is necessary to look to the oral agreements of the parties

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[3]In connection with the first point of this brief it is interesting to note that in the *Medina* case the court said: "We take note that the agreement between the owners and the union provided that if any member of a crew became ill at sea and returned home with the captain's approval, he would 'receive a full share for that particular trip only.'" To this paragrauh was appended a foot note reading as follows: "But we place no reliance on the provisions of the collective bargaining agreement in reaching our conclusion." This is of great importance because if the collective bargaining agreement were valid and binding on the parties, then the specific clause referred to would in a very simple and direct manner have disposed of the issue under consideration.

and to the prevailing custom. In this case all of the evidence on the point supports the court below and the position of the appellee.

The finding of the court below that appellee was entitled to wages to the end of the 1952 fishing year is clearly supported by the evidence and by the law and should be sustained.

III.

The Trial Court Correctly Awarded Appellee Maintenance Up to the Time That It Was Reasonably Determined That His Condition Had Become Permanent.

On this issue Judge Mathes in his opinion stated:

> "The shipowner's obligation to furnish maintenance is coextensive in time with his duty to furnish cure (*Skolar v. Lehigh Valley R. Co.,* 60 F. 2d 893, 895 (C. A. 2, 1932); *Cf. The J. F. Card,* 43 Fed. 92 (D. C., E. D. Mich., 1890)), and neither obligation is discharged until the earliest time when it is reasonably and in good faith determined by those charged with the seaman's care and treatment that the maximum cure reasonably possible has been effected. (*Farrell v. United States,* 336 U. S. 511, 517-519 (1949); *Cf. Calmar S.S. Corp. v. Taylor, supra,* 303 U. S. 523, at 528-530; *The Osceola, supra,* 189 U. S. 159 at 175; *Desmond v. United States,* 217 F. 2d 948 (C. A. 2, 1954), cert. denied, 348 U. S. ..... (4-18-55); *Reed v. Canfield, supra,* 20 Fed. Case (No. 11,641) at 429.)"

In *Lamon v. Standard Oil Co.,* 117 Fed. Supp. 831 (D. C., E. D. La., 1954), the court said:

> "The shipowner shall be liable to defray the expense of medical care and maintenance until the sick or

> injured has been cured, or until the sickness or
> capacity has been declared of a permanent characte

The case of *Farrell v. United States, supra,* 336 U.
511, cited by appellants also supports appellee on t
point. In that case the Supreme Court pointed out t
the United States was a party to the 1936 Geneva C
ference of the International Labor Organization and t
the convention there adopted was proclaimed by the pre
dent as effective for the United States on October
1939 (54 Stat. 1693). Article IV, Section 1, of t
convention provides:

> "The shipowner shall be liable to defray the exper
> of medical care and maintenance until the sick
> injured person has been cured, or until the sickness
> incapacity has been declared of a permanent cha
> acter."

In the *Farrell* case, the Supreme Court pointed out t
the Department of Labor has issued a summary of t
convention to the same effect. 336 U. S. at 517-18.

The rule that maintenance and cure shall continue u
such time as the condition is declared permanent rat
than only until the time that it has become permanent
the only rule consistent with the purposes of maintena
and cure. Maintenance is intended to continue as lo
as cure is necessary. Cure is necessary until it is d
covered that further medical treatment will be of no av
The medical care necessary to discover that the conditi
has become permanent is itself an essential part of t
cure.

Maintenance is designed to provide for the support
the seaman during the period of his cure and the int
of the law is that it should be paid concurrently with t

cure. If the right to maintenance were cut off at the ime the condition became permanent rather than at the ime that that fact was reasonably ascertained, then there vould be every inducement on the part of the employer o stop payment of maintenance as soon as there was any ossibility at all that the condition had become perma- nent. This in itself would tend to defeat the principal urpose of maintenance.

On this point, too, the decision of the court below was consistent with a proper interpretation of the law and with authorities on the issue.

IV.
Conclusion.

The trial court wrote a carefully considered opinion covering each of the issues raised on this appeal and citing numerous authorities in support of the holdings of the court. Without attempting in any way to distinguish or deal with the opinion of the court below or with the authorities relied upon in that opinion, appellants ask for a reversal. They cite no authorities which when properly analyzed support any position that they take. All of the authority is to the contrary. The decision of the court below should be affirmed in its entirety.

Respectfully submitted,

MARGOLIS, MCTERNAN & BRANTON,

By BEN MARGOLIS,

Proctors for Appellee.

No. 14909

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

MARION JONCICH, JOSEPH C. MARDESICH and ANTONIA DOGDANOVICH,

Appellants,

vs.

ANTHONY VITCO,

Appellee.

APPELLEE'S BRIEF.

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APPELLANTS' REPLY BRIEF.

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Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

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ANTHONY VITCO,

Appellee.

APPELLANTS' REPLY BRIEF.

Prefatory Statement.

The Statement of the Pleadings and Facts Showing Jurisdiction and the Statement of the Case and Questions Involved, as contained in appellants' opening brief, set out the issues herein and appellants respectfully submit that such need not be repeated here.

Appellee's brief contains, generally, the following points in the order named:

1. That the seaman may not under any circumstances contract away his right to wages to the end of his term of employment and that therefore paragraph V of the collective bargaining agreement [Resp. Ex. B] is void as against public policy.

2. That said collective bargaining agreement is ambiguous as to the question of fishing seasons and that

it does not support appellants' contention that the fishin season in which Vitco fell sick ended on June 30, 1952 and further that there was in fact an agreement t employ for the entire year and that such prevailed ove the collective bargaining agreement.

3. That a seaman is entitled to maintenance and cur beyond the time at which the maximum cure is obtained

Appellants will reply to each of these points in the orde set forth, numbering their arguments accordingly:

Summary of Reply Argument.

1. The courts have repeatedly held that a seaman ma contract away his various rights for a consideration unles such contract is specifically barred by statute; further that none of the cases cited by appellee in his brief sup port appellee's contention in that regard. There is nothin in the public policy of the present time that would in validate the provisions of Paragraph V of the said col lective bargaining agreement and that the sole basis fo the admiralty courts considering the seaman a "ward has disappeared.

2. The collective bargaining agreement, not havin been attacked in any manner except that the lower cour held paragraph V thereof void, effectually designate and establishes the two seasons in each calendar yea without any ambiguity and that Vitco was bound thereby further, that there was no contract to employ for a yea and that the prevailing custom and practice in San Pedr was to hire but for the single trip or voyage.

3. The seaman is entitled to maintenance and cur only until the time that the maximum benefit has bee obtained.

Argument.

1. On page 11 of his brief, appellee sets out that agreement which tends to deprive a seaman of his rights under the maritime law will be declared void. Appellants maintain that such agreements are valid if done for a consideration.

There is nothing authoritative in the decisions cited by appellee holding that a seaman may not, *for a consideration,* bargain away a right given to him under the law. Counsel for appellants has carefully reviewed each of the said citations beginning on page 11 of appellee's brief through to the middle of page 13. Each of them either supports appellants' position, refers to an absolute prohibition of certain contracts by statute (which is not the case at bar), or is pure dicta:

The Cypress, 6 Fed. Cases 1104, was a case in which there was an agreement in the shipping articles that the seamen would not sue for their wages when due, *i.e.* that the seamen would wait for a period of three months before bringing suit. *There was no consideration for this agreement* and, according to the accepted common-law rule of contracts, it was declared void, such holding being inapplicable to the case at bar.

The General J. A. Dumont, 158 Fed. 312, was a case in which the entire issue, as far as a seaman's right was concerned, was whether a seaman was entitled to his lien against the ship regardless of certain agreements in the charter contract *between the owner and the charterer, to which the seaman was not a party.* This case, having nothing to do with any facts similar to the case at bar, is irrelevant herein.

Conckin v. Lockwood, 231 Fed. 541, was a case wherei the issue was the seaman's right to share in salvage pro ceeds in the face of an alleged agreement to accept on month's wages in lieu thereof. However, the case wa specifically decided on two bases: (1) That there in fac was no contract entered into by the seaman, the cour stating:

> "On the whole . . . it would scarcely appea that there was any finally accepted agreement en tered into by libelant to receive a month's extr pay in all cases of salvage. . . ." and

(2) Section 4535 of the U. S. Revised Statutes provide that any stipulation by which a seaman abandoned an right to salvage would be inoperative. It is obvious tha this cited case has no application to the action at ba where there was in fact a contract and where ther was no statutory bar to the seaman's entering into suc a contract.

Gaynor v. The New Orleans, 54 Fed. Supp. 25. There Judge Goodman, in deciding in favor of a seaman's lie (there being no question of a seaman's stipulation t forego any right) on the vessel, set out the precise poin which supports appellants' contention herein:

> "Seaman's lien is a property right given by law . . . as a result of services to a vessel . . . i cannot be contractually waived . . . *unless fo a valid consideration.*" (Emphasis added.)

In *Cortes v. Baltimore Insular Line,* 287 U. S. 367 the entire and sole question involved before the Suprem Court was whether the death of a seaman resulting fron the negligent omission to furnish care or cure was death for personal injury within the meaning of th Jones Act. There was no question directly or indirectl

involved as to the validity of a seaman's contract to waive or diminish one of his rights. Nothing was brought up before the court about such a proposition and neither side presented authorities in that regard because it was not involved. Under such circumstances the statement of the Court therein with reference to maintenance and cure is, of course, pure dicta and cannot be considered as binding or authority or precedent by this Honorable Court, it being an incidental remark extraneous to the questions involved. (*KVOS, Inc. v. Associated Press,* 299 U. S. 269; *Harvey Co. v. Malley,* 288 U. S. 415.)

The next case cited by appellee on this proposition is that of *Harden v. Gordon,* Fed. Cases 6047, in which Justice Story first enunciated the "ward of admiralty" doctrine in 1823. Justice Story's decision, too, fits in exactly with appellants' position:

> ". . . hence, every deviation from the terms of the common shipping paper is rigidly inspected, and if additional burthens or sacrifices are imposed on the seaman *without adequate remuneration,* the court feels itself authorized . . . to moderate or annul the stipulation." (Emphasis added.)

Again the clear import of this decision also is that if there is adequate consideration such a contract is enforceable.

Appellee also cites *DeZon v. American President Lines,* 318 U. S. 660, in which again nothing appears but pure *obiter dicta,* the sole two issues there involved being whether a shipowner was liable for the negligence of the ship's doctor and whether, in that case, there was in fact any negligence on the part of said doctor. There was nothing directly or indirectly involved there con-

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cerning the validity of a seaman's contract to waive a right for a consideration.

Appellee next cites three cases, *Venides v. United Greek Shipowners Corp.,* 168 F. 2d 681, *Glandzis v. Callinicos,* 140 F. 2d 111, and *Lakos v. Saliaris,* 116 F. 2d 440, which this reply brief will deal with together as they involve generally the same circumstances. In the *Venides* and *Lakos* cases certain moneys were to be held back from the seamen's wages and sent abroad to a foreign bank and in each case our courts held that this was an allotment prohibited by 46 U. S. Code 596, 597 or 599. These decisions have no part in the case at bar as the present Vitco case is not concerned with a contract specifically prohibited by law. The *Glandzis* case is inapplicable as the contract which was in effect was between the Greek government and the shipowner, and not, as here, between the seaman acting through his union and the owners of the vessel.

The case of *O'Donnell v. Great Lakes Dredge & Dock Co.,* 318 U. S. 36, has nothing to do with a seaman's contract and, too, is inapplicable.

Appellee's citation of *McCarthy v. Steam-Propeller City of New Bedford,* 4 Fed. 818, on page 13 of his brief, as being authority for the proposition that a seaman's rights cannot be cancelled out by private agreement, has nothing whatsoever to do with such a theory. It is a long decision on whether a seaman's wages could be garnished and contains an excellent dissertation on the rights and obligations involved in the history of garnishment but is completely irrelevant to the issues herein.

In the case of *The San Marcos,* 27 Fed. 567, a seaman agreed that any wages due him would be forfeited if he

absented himself without leave. Again, *there was no consideration for such a promise,* and the decision has nothing whatever to do with the present case.

The case of *Lakos v. Saliaris,* 116 F. 2d 440 has been referred to hereinabove.

In summarizing the appellee's authorities on this point, it is readily seen that in none of them has a court decided that a seaman's contract to give up a right for a consideration (unless specifically made invalid by statute) was unenforceable. To the contrary, the courts have, in effect, held in the cases involved that such may be done for a valid consideration (see *Harden v. Gordon and Gaynor v. The New Orleans, supra*).

It appears to be appellee's position that a seaman, *per se,* is incapable of entering into a contract by which he gives up a right for a consideration and that the courts should consider such a contract as void as one entered into, for example, by an insane person. In this respect it seems that the appellee's attack on the collective bargaining agreement's paragraph V [Resp. Ex. B] is based on two propositions (a) that the seaman is incapable of entering into such agreement, or (b) such agreement is void as against public policy. Accordingly, appellants will discuss these two alleged bases in order:

(a) Although in 1823 Judge Story held that the seaman was a "ward of admiralty" no court yet has ever held that a seaman cannot validly contract (except in cases specifically prohibited by statute). Furthermore, the courts have always held that a seaman may, for a consideration, contract away his rights under the general maritime law, under the Jones Act, and under the maintenance and cure doctrine, *after* they have arisen, through the medium of a release which is, of course, merely

another form of contract or stipulation. (*Garrett Moore-McCormack Co.,* 317 U. S. 239.) If a seam may release his rights for a consideration after th have arisen or partially arisen, then he is certainly ca able, under the law, of releasing them for a considerati *before* they have arisen. The courts, by allowing se man's release to be enforced, have obviously not class seamen with idiots or others incapable of contractin This being so, there is nothing to prohibit a contra such as the one involved here and the courts have nev so prohibited it.

Turning from the courts to the legislature to determi if there is any prohibition, we find that although the Co gress has specifically set out that certain contracts ma by seamen are void, such as allotment of wages, salva shares, etc., the Congress has never seen fit to inclu in such prohibitions the seaman's rights to maintenan and cure, damages under the Jones Act, wages to t end of the voyage, and his contracts in connection ther with.

(b) With regard to appellee's stand in connecti with the holding by the trial court herein that par graph 5 of the collective bargaining agreement [Res Ex. B] was void as against public policy, appellan respectfully submit that:

First, there was no attack, either at the trial or appellee's brief, on the collective bargaining agreemer In it is set out that the union was recognized as t exclusive bargaining representative of all of the er ployees covered by the agreement [Par. I of Res Ex. B.] Vitco and the vessel "PIONEER" were bo covered thereby [Supp. Tr. pp. 3 and 4]. In the absen of evidence to the contrary this relationship of age

and principal between Vitco and his union must stand. Further, and this is of greatest importance, the trial court did not find such collective bargaining agreement void except as to paragraph V thereof.

As for this public policy, it appears that the entire doctrine of the "ward of admiralty" theory stems from Justice Story's decisions and the reasons behind it in the *Harden v. Gordon* case (*supra*). What were the reasons and do they now exist? In that case, Justice Story stated:

> "Every court should watch with jealousy on encroachment upon the rights of seamen, *because they are unprotected and need counsel*". (Emphasis added.)

In a contemporary case involving seamen and their contractual rights, *Brown v. Hull*, 4 Fed. Cases 407, Justice Story at page 409 in setting out the *reasons behind* the "ward of admiralty" doctrine, stated:

> ". . . bargains between them and shipowners, the latter being persons of great intelligence and shrewdness in business, are deemed open to much observation and scrutiny; *for they involve great inequality of knowledge, of forecast, of power, and of conditions.* Courts of Admiralty *on this account* are accustomed to consider seamen as *peculiarly entitled to their protection*". (Emphasis added.)

The true and only reason for the courts adopting the status apparently, of guardian and ward relating to the seaman is that the seaman is "unprotected" and is "inequal" in "power" and "knowledge" to the shipowners. *This condition simply does not exist today* for the reasons heretofore set out in appellants' opening brief. The power and knowledge of the maritime labor unions act-

ing for their members has completely cut away t
basis of this doctrine. The law being a living thing a
being based on reason, it should and must change as t
country's economic and sociological changes are mad
The changed conditions must be recognized for the simp
fact that they exist. On this point appellants repeat t
words of the Supreme Court in *Patton v. United State*
281 U. S. 276 at 306:

> "The truth is that the theory of public poli
> embodies a doctrine of vague and variable qualit
> and unless deducible in the given circumstances fro
> constitutional or statutory provisions, should be a
> cepted as the basis of a judicial determination, if
> all, only with the utmost circumspection. *The pub*
> *policy of one generation may not, under chang*
> *circumstances, be the public policy of another.*" (Em
> phasis added.)

In the field of law, when the reasons for the existen
of a doctrine have disappeared, in all due conscien
the doctrine itself should disappear.

There never having been a decision by any court o
the exact point herein involved, it is respectfully urg
that this Honorable Court make its decision on t
question of public policy in this case in accordance wi
the facts as they exist today and not as they did in 182

2. On the question of the validity of paragraph XI
of the collective bargaining agreement [Resp. Ex. B] an
the length of the term for which Vitco was hired, t
appellants contend:

First of all, appellee states that the appellants admitte
in the answer that Vitco had been hired for the tur
fishing season of the year 1952. Appellee's counsel com
pletely overlooks the pre-trial stipulation entered in

by counsel for the parties on November 12, 1954, under Rules of Civil Procedure, Rule 16, superseding the pleadings and defining the issues. Under the heading therein of "Unadmitted Fact to be Litigated by the Parties" is to be found the issue: "Whether or not libelant was employed by the respondents pursuant to an oral agreement of hiring for the period of the entire fishing season of the year 1952." [Third Supp. Record on Appeal, pp. 2, 3.] The pre-trial stipulation setting forth the issues and superseding the pleadings is a full answer to appellee's statement on this point in his brief.

Paragraph XIV of the collective bargaining agreement [Resp. Ex. B] is clear and unambiguous:

> "When crew members are hired, they are hired for the season and may be discharged only for good cause shown.
>
> "For boats fishing tuna all-year round, there shall be two tuna seasons within a year. One season shall commence on January 1st and end on the following June 30th, and the next season shall commence on July 1st and end on the following December 31st. . . ." [Par. XIV, Resp. Ex. B.]

It is clear that this provision, which was not declared invalid or void by the trial court, plainly sets out that when Vitco was hired, he was hired for the season, and then goes on and carefully defines the meaning of the word "season" as used therein. When Vitco fell ill in January, 1952, he had been hired for that season which by definition ended on June 30, 1952. Under all of the circumstances most adverse to appellants, Vitco was still entitled, at the most, to his share of the catch to the end of the season during which he fell ill, that is, to and including the voyage which began prior to June 30, 1952, and ended July 25, 1952.

Further, appellants maintain that there was no e dence adduced of any contract for a year and that a pellee failed to bear his burden of proof in that regar that if in fact there was such a contract, it was witho consideration since the shipowner received nothing f such a contract, the collective bargaining agreement ready being in existence, and, moreover, that such "o contract" was subordinate to the collective bargaini agreement provisions.

3. On the question of the duration of the maintenar and cure, this is a matter on which apparently neith counsel for the parties has been able to find a ca directly in point, that is, where the question was broug up as to whether the seaman is entitled to maintenar and cure until the date he has reached his maximum cu according to the medical evidence, or until the date wh medical evidence has declared that he reached it some prior time. Although the amount here involved this point is small, it is a most important phase of t case, for the decision of this Honorable Court will the only decision extant. On this subject appellar have three additional cases supporting their view that t seaman is entitled to maintenance and cure only until t maximum recovery has been made:

In the case of *McLeod v. Union Barge,* 204 F. 2d 68 it was held that the point where maintenance and cu payments ceased was when "she reached the point her recovery . . . where care and further treatme would not benefit her."

In *Haywood v. Jones & Laughlin Steel Corp.*, 107 Fe Supp. 108 the court held that the liability for maintenar and cure does not extend beyond the time when the max mum cure possible has been effected.

The court in *Desmond v. United States,* 105 Fed. Supp. 9, stated:

> ". . . the duty to provide . . . extends until a seaman has reached his maximum possible cure."

As stated above, although this point involves but a small sum of money herein, a decision on this point adverse to the appellants contention, could well give rise to numerous fraudulent claims wherein the seaman, after reaching a point of maximum benefit, could avoid further medical examination for a matter of years until required so to do as a discovery proceeding in litigation and then recover, under this Honorable Court's decision, for maintenance and cure during the interim period when, as a true matter of law and equity, he would not be entitled thereto. Too, if the criterion is set up by this Honorable Court as being the date on which medical evidence states the seaman reached the maxinum recovery at a prior time, all maintenance and cure cases in the future may be subject to confusion and doubt. For example, if two or more doctors, including United States Public Health Service physicians, testify that on varying dates they determined that at a prior date the seaman had reached his maximum cure, it will be very difficult and highly confusing to attempt to determine which of the doctors' varying dates should be taken as the end of the maintenance and cure period. It is strongly urged by appellants that this Honorable Court reverse the trial court on this point and approve the standard set up by the Supreme Court in *Farrell v. United States,* 336 U. S. 511 at pages 518 and 519:

> "That the duty of the ship to maintain and care for the seaman after the end of the voyage only *until he was so far cured as possible,* seems to have

been the doctrine of the American admiralty cou
prior to the adoption of the Convention by Congre
. . . It has been the rule of admiralty courts sin
the convention." (Emphasis added.)

Conclusion.

From the evidence adduced at the trial, the authorit
and the law, and the burden of proof resting on t
appellee in the trial court, it is respectfully urged th
the appellee's judgment for $5,843.00 be decreased
$270.00; that the appellee take nothing for his share
the catch, or in the alternative that his judgment f
$6,681.95 for such share be reduced to $5,213.91, t
amount authorized under paragraph XIV of the collecti
bargaining agreement. [Resp. Ex. B].

Respectfully submitted,

ROBERT SIKES,

Proctor for Appellants.

No. 14910

United States
Court of Appeals
for the Ninth Circuit

CHARLES COX and ALBERT EARL JONES,

Appellants,

vs.

AGNES H. REMILLARD, Administratrix of the Estate of Edward S. Remillard, Deceased,

Appellee.

Transcript of Record

Appeal from the United States District Court for the District of Oregon.

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.—12-16-55

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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—cross 3

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In the District Court of the United States
for the District of Oregon
Civil No. 7891

AGNES H. REMILLARD, Administratrix of the Estate of Edward S. Remillard, Deceased,

Plaintiff,

vs.

CHARLES COX and ALBERT EARL JONES,

Defendants.

COMPLAINT

Comes now the plaintiff and for cause of action against the defendants alleges:

I.

That plaintiff is a citizen of the State of Oregon and is the duly appointed, qualified and acting administratrix of the estate of Edward S. Remillard, deceased, and defendants are citizens of the State of Washington. That said Edward S. Remillard was at the time of his death a citizen of the State of Montana. That the matter in controversy exceeds, exclusive of interest and costs, the sum of Three Thousand Dollars ($3,000.00).

II.

That on December 6, 1954, the defendant, Albert Earl Jones, was operating a motor vehicle owned by defendant Charles Cox in a westerly direction on U. S. Highway No. 30 at a point approximately 1½ miles west of the City of The Dalles, in the County of Wasco, State of Oregon, and at said time

and place defendants negligently drove said motor vehicle against and into the rear end of an automobile in which Edward S. Remillard was riding as a passenger.

III.

That at said time and place the defendant, Albert Earl Jones, was operating said motor vehicle within the course and scope of his authority and employment as servant, agent and employee of defendant Charles Cox.

IV.

That as a result Edward S. Remillard was thrown in and about said automobile and sustained injuries which resulted in his death.

V.

That said Edward S. Remillard at the time of said collision, injury and death was three years of age and left surviving neither widow or surviving dependents and the plaintiff maintains this action as the administratrix of his estate for the benefit of his estate.

Wherefore, plaintiff demands judgment against defendants, and each of them, in the sum of $20,000.00 and costs.

/s/ ARTHUR S. VOSBURG,

/s/ WILLIAM H. HEDLUND,

/s/ FRANK BOSCH,

Attorneys for Plaintiff.

[Endorsed]: Filed January 6, 1955.

[Title of District Court and Cause.]

ANSWER

For their answer to plaintiff's complaint the defendants admit and deny as follows:

I.

Defendants admit that on or about December 6, 1954, the defendant, Albert Earl Jones, was operating a motor vehicle on U. S. Highway No. 30 and that the vehicle he was operating collided with the vehicle in which Edward S. Remillard was a passenger. Defendants further admit that Edward S. Remillard sustained injuries which resulted in his death.

II.

Except as herein expressly admitted, the defendants deny the allegations contained in plaintiff's complaint.

Wherefore, defendants pray that plaintiff take nothing on her complaint and that defendants recover their costs and disbursements incurred herein.

COLLIER, BERNARD, BERNARD & EDWARDS,

/s/ WILLIAM F. BERNARD,

/s/ EDWIN L. DUNNAVAN,

Attorneys for Defendants.

Service of copy acknowledged.

[Endorsed]: Filed February 14, 1955.

[Title of District Court and Cause.]

PRETRIAL ORDER

On April 11, 1955, the above case came on regularly for pretrial conference before the undersigned Judge of the above-entitled court. The plaintiff appeared by and through one of her attorneys, Frank McK. Bosch, and the defendants appeared by and through one of their attorneys.

Admitted Facts

The following facts have been agreed upon by the parties and require no proof:

I.

That plaintiff is a citizen of the State of Oregon and is the duly appointed, qualified and acting administratrix of the estate of Edward S. Remillard, deceased, and defendants are citizens of the State of Washington. That said Edward S. Remillard was at the time of his death a citizen of the State of Montana. That the matter in controversy exceeds, exclusive of interest and costs, the sum of Three Thousand Dollars ($3,000.00).

II.

That on or about December 6, 1954, the defendant, Albert Earl Jones, was operating a 1948 Peterbilt tractor and attached semi-trailer, owned by defendant Charles Cox, in a westerly direction on U. S. Highway No. 30 at a point approximately 1½ miles west of the City of The Dalles in the County of

Wasco, State of Oregon, and at said time and place said 1948 Peterbilt truck collided with a vehicle in which Edward S. Remillard was riding as a passenger.

III.

That at said time and place Albert Earl Jones was operating said 1948 Peterbilt truck within the course and scope of his authority and employment as the servant, agent and employee of defendant Charles Cox.

IV.

That as a result of said collision Edward S. Remillard sustained injuries which resulted in his death.

V.

That said Edward S. Remillard at the time of said collision, injury and death was three years of age and left surviving neither widow or surviving dependents and the plaintiff maintains this action as the administratrix of his estate for the benefit of his estate.

VI.

That Edward S. Remillard at the time of his death had a life expectancy of 61 years.

Plaintiff's Contentions

I.

That at said time and place defendants were negligent in the following respects:

(1) They failed and neglected to keep a proper or any lookout for vehicles on U. S. Highway No.

30 and particularly the automobile in which Edward S. Remillard was riding as a passenger;

(2) They operated their vehicle at a speed greater than was reasonable and prudent having due regard to the traffic and other conditions then and there existing;

(3) They failed and neglected to have, keep and maintain their vehicle under proper or any control.

II.

That as a direct and proximate result of the defendant's negligence as aforesaid the estate of plaintiff's intestate was damaged in the sum of Twenty Thousand Dollars ($20,000.00), including reasonable funeral and burial expenses in the sum of Two Hundred Thirty-eight Dollars ($238.00).

Defendants deny the foregoing.

Defendants' Contentions

I.

Defendants contend that they were not negligent in any of the particulars alleged.

Physical Exhibits

The following exhibits have been enumerated and identified, the parties agreeing with the approval of the court that no further identification is required, the same being subject to objection only upon the grounds of irrelevancy, incompetency and immateriality:

Plaintiff's Exhibits:

(1) Statement of expenses incurred for the funeral and burial of Edward S. Remillard;

(2) Photographs of automobile in which Edward S. Remillard was riding taken after the collision;

(3) Drawing of the scene of the collision (reserved);

(4) Deposition of defendant Albert Earl Jones.

Defendants' Exhibits:

(1) Photographs of defendants' motor vehicle taken after the collision (reserved);

(2) Photographs of automobile in which Edward S. Remillard was riding taken after the collision (reserved);

(3) Photographs of scene of accident;

(4) Deposition of Floyd Daley;

(5) Deposition of Edith R. Daley.

Jury Trial

Neither party has made a request for a jury trial.

The parties hereto agree to the foregoing pretrial order, and the court being fully advised in the premises,

Now Orders the foregoing pretrial order shall not be amended except upon the consent of both parties or to prevent manifest injustice.

Dated at Portland, Oregon, this 24th day of May, 1955.

/s/ CLAUDE McCOLLOCH,
Judge.

Approved:

/s/ FRANK McK. BOSCH,
Of Attorneys for Plaintiff.

/s/ WILLIAM F. BERNARD,
Of Attorneys for Defendants.

/s/ JOHN D. RYAN,
Of Attorneys for Defendants.

[Endorsed]: Filed May 24, 1955.

[Title of District Court and Cause.]

MEMORANDUM OF DECISION

In Lane v. Hatfield (1943) the Oregon Supreme Court approved a judgment of $5,000.00 in the case of a seven-year-old girl. I have arrived at the amount allowed here by adding 50% on account of the difference in sex and 50% for difference in value of money, total $10,000.00.

Dated June 3, 1955.

/s/ CLAUDE McCOLLOCH,
Judge.

[Endorsed]: Filed June 3, 1955.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above-entitled cause came on regularly for trial before the Honorable Claude McColloch, judge of the above-entitled court, on May 24, 1955, a jury

having been waived by both of the parties, plaintiff appearing in person and by her attorneys, William H. Hedlund and Frank McK. Bosch, defendants appearing in person and by their attorneys, John D. Ryan, John Gavin and Edwin L. Dunnavan. After opening statements by respective counsel witnesses were sworn and testified and the court having heard and considered the evidence and the closing arguments of respective counsel and being fully advised in the premises, makes the following

Findings of Fact

I.

That on December 6, 1954, the plaintiff's intestate, Edward S. Remillard, while riding as a passenger in an automobile operated by Floyd Daley in a westerly direction on U. S. Highway No. 30 at a point approximately 1½ miles west of the City of The Dalles, in the County of Wasco, State of Oregon, sustained injuries which resulted in his death when said automobile was struck from the rear by a 1948 Peterbilt tractor and attached semi-trailer, owned by defendant Charles Cox and operated by defendant Albert Earl Jones.

II.

That the aforementioned injuries which resulted in the death of plaintiff's intestate were caused by the negligence of the defendants in that defendants failed to keep a proper lookout, failed to have their vehicle under proper control, and operated their vehicle at a speed greater than was reasonable and

prudent under the conditions then and there existing.

III.

That as a direct and proximate result of the aforementioned negligence on the part of the defendants, and each of them, plaintiff's intestate sustained injuries which resulted in his death, all to plaintiff's damage in the sum of $.....

IV.

That as a result of said accident plaintiff was obliged to incur expenses for the funeral and burial of Edward S. Remillard in the sum of $238.00.

Based upon the above findings of fact the court deduces the following

Conclusions of Law

The plaintiff is entitled to recover judgment against the defendants, and each of them, in the sum of $10,000, general damages, and $238.00, special damages.

Dated at Portland, Oregon, this 3rd day of June, 1955.

/s/ CLAUDE McCOLLOCH,
Chief Judge.

[Endorsed]: Filed June 3, 1955.

In the District Court of the United States
for the District of Oregon

Civil No. 7891—103-141

AGNES H. REMILLARD, Administratrix of the Estate of Edward S. Remillard, Deceased,

Plaintiff,

vs.

CHARLES COX and ALBERT EARL JONES,

Defendants.

JUDGMENT

This matter coming on to be heard on the motion of plaintiff for judgment in the above-entitled action based on Findings of Fact and Conclusions of Law rendered by this court, and it appearing to the court that plaintiff is entitled to a judgment herein, and the court being fully advised in the premises;

Now, Therefore, based upon the Findings of Fact and Conclusions of Law, proceedings and evidence adduced herein,

It Is Hereby Ordered and Adjudged that plaintiff have and recover of and from the defendants, Charles Cox and Albert Earl Jones, and each of them, the sum of $10,238.00;

It Is Further Ordered and Adjudged that plaintiff have and recover from defendants, and each of them, her costs and disbursements taxed at $189.70 and that execution issue therefor.

Dated at Portland, Oregon, this 7th day of June 1955.

/s/ CLAUDE McCOLLOCH,
Chief Judge.

[Endorsed]: Filed June 7, 1955.

[Title of District Court and Cause.]

OBJECTIONS TO FINDINGS OF FACT AND CONCLUSIONS OF LAW AND JUDGMENT

Come now the defendants herein, by John D. Ryan of their attorneys, and object to the Findings of Fact and Conclusions of Law and Judgment herein as follows:

1. That Finding of Fact II is clearly erroneous in that there was no substantial or any evidence to support the finding that defendants were negligent by reason of failure to keep a proper lookout, failure to have their vehicle under proper control, and that said vehicle was operated at a speed greater than was reasonable and prudent under the conditions then and there existing.

2. That Finding of Fact III is clearly erroneous in that there is no substantial or any evidence to support said finding that the injuries and death sustained by plaintiff's intestate are the direct and proximate result of negligence on the part of defendants.

3. That the Conclusion of Law and Judgment herein awarding damages in the sum of $10,238 is excessive and said conclusion is not supported by substantial or any evidence.

4. That judgment in the sum of $10,238 in addition to being excessive, as stated herein, is in excess of the amount awarded by the trial court in its memorandum opinion which awarded damages in the total sum of $10,000 and is therefore clearly erroneous in that the same exceeds the finding of the trial court in its own memorandum of decision.

5. That the court erred in not finding that the sole and proximate cause of the injuries sustained by plaintiff's intestate and his death was the negligence of the driver of the vehicle in which plaintiff's intestate was a passenger at the time said injuries were sustained.

6. That the judgment against defendant Charles Cox is not supported by substantial evidence herein and the law applicable thereto.

7. That the statute, giving rise to plaintiff's cause of action herein 30.120 O R S provides no standard in the instant case from which damages can be assessed and that the finding of damage in this case was based upon no substantial evidence or evidence of such a vague and speculative nature that the finding of damages in excess of the funeral expenses of $238.00 constitutes a deprivation of property without due process of law in violation of

the Fourteenth and Fifth amendments of the Constitution of the United States of America.

/s/ JOHN D. RYAN,
RYAN & PELAY,
Attorneys for Defendants.

Service of copy acknowledged.

[Endorsed]: Filed June 16, 1955.

[Title of District Court and Cause.]

ORDER OVERRULING OBJECTIONS TO FINDINGS OF FACT AND CONCLUSIONS OF LAW AND JUDGMENT

This matter having come on to be heard before the undersigned Judge on the 11th day of July, 1955, on the objections to findings of fact and conclusions of law and judgment filed herein by defendants, and the court having heard arguments of respective counsel and being fully advised in the premises;

Now, Therefore, It Is Hereby Ordered that defendants' objections to findings of fact and conclusions of law and judgment as filed herein are overruled.

Dated this 11th day of July, 1955.

/s/ CLAUDE McCOLLOCH,
Chief Judge.

[Endorsed]: Filed July 13, 1955.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given, that Charles Cox and Albert Earl Jones, the defendants above named, hereby appeal to the United States Court of Appeals for the Ninth Circuit from each and every part and from the whole of the final judgment entered in this action on June 7, 1955, as corrected by order entered July 7, 1955, and from the final order entered July 11, 1955, overruling said defendants' timely motion objecting to the Findings of Fact, Conclusions of Law and Judgment.

/s/ T. H. RYAN,

RYAN & PELAY,
Attorneys for Defendants.

Service of copy acknowledged.

[Endorsed]: Filed August 8, 1955.

United States District Court, District of Oregon

Civil No. 7891

AGNES H. REMILLARD, etc.,

Plaintiff,

vs.

CHARLES COX and ALBERT EARL JONES,

Defendants.

TRANSCRIPT OF PROCEEDINGS

Tuesday, May 24, 1955, A.M.

Before: Honorable Claude McColloch, Chief Judge.

Appearances:

WILLIAM H. HEDLUND, and
FRANK McK. BOSCH,

Attorneys for Plaintiff.

JOHN D. RYAN,
EDWARD DUNNAVAN,
JOHN GADIN,

Attorneys for Defendants.

* * *

FLOYD DALEY

produced as a witness on behalf of Plaintiff, being first duly sworn, was examined and testified as follows. [2*]

Direct Examination

By Mr. Bosch:

* * *

Q. Mr. Daley, the little boy, Eddie Remillard, he would be related to you as a nephew, would he not?

A. Right.

Q. His mother and your wife are sisters?

A. That is correct.

Q. How long had you known Eddie?

A. Five to six months.

Q. During that period of time did you see him often?

A. Quite often in the latter part of the——

Q. You say the latter part; a matter of months or weeks? A. Last three months.

Q. And how often would you say you saw him in those last three weeks?

A. Two or three times a week.

Q. I misspoke myself, I think, Mr. Daley, I should have said in the last three months. You say that you saw him [14] approximately two or three times a week during those last three months?

A. That is right.

Q. Excuse me. During that period of time did you have occasion to observe his health and his mentality and general fitness? A. I did.

Q. Did he appear to be healthy, a normal boy?

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

(Testimony of Floyd Daley.)

A. To the best of my knowledge, yes.

Q. Did you observe him playing with other children? A. Yes.

Q. And did he seem to get along all right and be just like every other child? A. Yes.

Q. Was he a bright and alert boy or——

A. Apparently so.

Q. Did he during that period of time have any serious sickness that you recall? A. None.

Q. Did he appear to be healthy? A. Yes

Mr. Bosch: I think that's all.

Cross-Examination

By Mr. Dunnavan:

Q. Mr. Daley, where did this Remillard boy live? [15] A. At what time?

Q. At the time you knew him for the five or six months.

A. Well, when I first knew him, he was out on a visit from Montana with his mother.

Q. At the place that you live?

A. He was visiting relatives in Oregon.

Q. Relatives in Oregon? A. Yes.

Q. Where was that?

A. Umatilla, Hermiston, The Dalles.

Q. How old was he then?

A. Around three.

Q. And how often did you see him then when he was in Umatilla and Hermiston?

A. Week ends.

(Testimony of Floyd Daley.)

Q. On week ends? A. Yes.

Q. How many? A. Three.

Q. All right. Now, where else did you see Eddie in the five or six months?

A. Around The Dalles.

Q. And did he live there at The Dalles then?

A. Yes.

Q. Where was that, Mr. Daley? [16]

A. His mother was out to the—brought him and they stayed at several different places.

Q. Stayed at several. Were they visiting there?

A. Well, I wouldn't say for sure because it started as a visit and didn't end quite as a visit.

Q. Well, did they visit you? I mean, did this boy live with you at all? A. No.

Q. You had only known him for the last five or six months before this accident? A. Yes.

Q. Do you know where he was born?

A. From what I have been told he was born at Glendive, Montana.

Q. I see. And what was it that you said, he was alert and bright and did the things other children his age did? What specifically was it that he did or you observed that leads you to give us that conclusion, Mr. Daley? Can you give us an example or an idea of what he did or said upon which you base your conclusions?

A. There in a case like that I cannot see that there can be any specific item or thing.

Q. How many times do you think you actually

(Testimony of Floyd Daley.)

saw the boy the five or six months that he wa
there? A. 50 times or better.

Q. Was he living the day of the accident wit
his mother? [17]

A. With his mother who was living on Route
The Dalles.

Q. Route 3, The Dalles? A. Yes.

Q. Was she working in The Dalles?

A. No.

Q. Where did she live?

A. On Route 3, which is approximately 10 mil
from The Dalles.

Q. In what direction? A. Southeast.

Q. Southeast. And how long had Mrs. Remillar
and her son been living at that address before th
accident? A. Over two months.

Q. Whose place was this?

A. The place belonged to a man by the name
Cooper.

Q. Cooper? A. I believe that was it.

Q. Was that the home of this boy and his mothe
at the time?

A. No, it was not Cooper; it was Foster.
Foster was the man's name.

Q. C. Foster. Did Mrs. Remillard work there

A. Not for Foster.

Q. Where was she employed?

A. She was keeping house for my brother.

Q. For your brother? A. Yes. [18]

Q. I see. Well, the reason I am asking this
notice that in the Complaint it is claimed that th

(Testimony of Floyd Daley.)

child resided in Montana, was a resident of Montana for whom this action was brought and do you know whether or not the child had a home in Montana? A. His father was still in Montana.

Q. His father was in Montana? A. Yes.

Q. All right. In any event, you picked up this boy this day around—went out in the morning to visit, as I understand it, Mr. Daley? A. Yes.

Q. And the boy wanted to come home with you, is that the idea? A. Yes.

Q. Where had you got this car you were driving? A. I borrowed it from my brother.

Q. And when had you borrowed it?

A. About a week before.

Q. What brother is this you borrowed it from?

A. George Daley.

Q. George Daley. Where did he live?

A. I believe he had just moved to 1212 East 10th.

Q. Oh. He lived up in The Dalles?

A. Yes. [19]

* * *

EDITH DALEY

produced as a witness on behalf of the plaintiff, being first duly sworn, was examined, and testified as follows: [41]

Direct Examination

By Mr. Bosch:

* * *

Q. The little boy, Eddie, who was killed, how long had you known him?

A. Since he was about—oh, I'd say—six weeks old. [44]

Q. And do you know where he was born?

A. Glendive, Montana.

Q. Where did you see him when he was six weeks old? A. In Glendive.

Q. And he was living with whom at that time?

A. With Mr. and Mrs. Remillard.

Q. Was Eddie their natural child?

A. No; he was not.

Q. Now, how long a period of time just prior to the accident had you seen Eddie? Let me put it differently. How often would you see Eddie, say in the last six months of his life?

A. Quite regularly.

Q. When you say "quite regularly," would that be a matter of every week or every month or——

A. Well, I spent part of the summer in Glendive——

Q. I see. Is that——

A. ——at the Remillard home.

Q. Summer of last year? A. Pardon?

(Testimony of Edith Daley.)

Q. Summer of last year?

A. Yes, and Mrs. Remillard was up at my place.

Q. Your place where?

A. In Billings, Montana.

Q. I see. Well, during this period shortly before the death, did he appear from your observation and association with him [45] to be bright, alert, normal? A. Exceptionally so.

Q. I don't know whether I understood your answer to a previous question but when I was asking you about it, I think I asked you whether Eddie was the natural child of Mr. and Mrs. Remillard and what was your answer? A. No.

Q. Was he adopted?

A. He was an adopted child. [46]

* * *

Cross-Examination

By Mr. Dunnavan:

* * *

Q. Now, you had seen this boy when he was six weeks old, [50] as I understand it, in Montana?

A. Eddie, you mean?

Q. Eddie, I mean. A. Yes, sir.

Q. Was this before or after he had been adopted?

A. It was before he had been adopted but it was after Mr. and Mrs. Remillard had taken him.

Q. I see. And then you did not see him again, I take it, until he came with Mrs. Remillard to the State of Oregon?

(Testimony of Edith Daley.)

A. No; you are mistaken. I lived in Montana too. We—I lived in Billings, Montana, for a long time.

Q. Well, did you and Mr. Daley live in Montana while this boy—from the time he was six weeks on?

A. No. Mr. Daley wasn't in Montana all the time.

Q. I see. Well, you saw the boy quite often, then, did you, Mrs. Daley? A. Yes, sir; I did.

Q. And you saw him in Oregon, then, over the last six months before this accident?

A. I had seen him in Oregon since October.

Q. October? A. Yes.

Q. Is that when he came here?

A. No; that's when I came here.

Q. When you came here? [51] A. Yes.

Q. You came from Montana to here?

A. Yes; I did.

Q. I see. Now, was the boy's mother and father with him here in Oregon when he was here then?

A. His mother was; his father came later. [52]

* * *

EDWARD S. REMILLARD

a witness for the plaintiff, was sworn and testified as follows:

Direct Examination

By Mr. Bosch:

Q. Mr. Remillard, you are the father of the little boy that was killed, are you not?

A. Yes, sir.

Q. Your name is the same? A. Yes, sir.

Q. Was he a junior and you a senior?

A. He was third.

Q. He was third? A. Yes.

Q. You are the junior?

A. I am the junior.

Q. Where do you live, Mr. Remillard?

A. In The Dalles.

Q. Do you have any other children?

A. No, sir.

Q. How long have you and your wife been married?

A. We was married July the 1st of 1946.

Q. 1946. That was about nine years, almost?

A. Yes, sir.

Q. Did you ever have any children during your marriage? A. No, sir. [56]

Q. I understand from testimony of Mrs. Daley that Eddie was adopted? A. That is right.

Q. In what jurisdiction was he—was the adoption proceedings?

A. Well, I can't tell you what District Court but it was in the eastern court in Montana; I believe it's the 7th District Court in Montana.

(Testimony of Edward S. Remillard.)

Q. Do you remember the day that he was born?

A. He was born the 21st of October, 1951.

Q. Do you remember——

A. Or 24th, excuse me. 24th of October.

Q. ——do you remember the day that you finally got the adoption decree which made him yours?

A. I do not for sure; it was some time in February of 1952.

Q. I see. During his life did he have any serious illnesses? A. No. He was very healthy.

Q. Did he ever sustain any injury? Did he fall and hurt himself seriously at all? A. No, sir.

Q. Well, then, when did you first see him after he was born?

A. He was three days old when we got him.

Q. And you have had him continuously ever since? A. Yes.

Q. During the period between the time he was born and the time the adoption decree was entered, why, I assume the boy [57] was living with you at that time?

A. Yes; due to the fact his parents deserted him we had to wait one year to get legal custody.

Q. I see. Tell us something about—well, to describe Eddie, whether he was alert or helpful? What did he do?

A. Well, about the time he got old enough so he could walk around he used to come—the minute he come in the house he would walk over and turn the radio on and then a little later on I used to do a little radio servicing in my spare time and he got

(Testimony of Edward S. Remillard.)

so that he would come up there and help me. As a matter of fact, toward the last few months he was with me he had a stool that he worked at the bench with me. He would set and watch me work. And I was building another house alongside of the home that I have there and he had his nails there and his little hammer. Of course, naturally, why, he wasn't driving them into very much wood but he was driving them into the edge of the keg which was a wooden box—I mean, we get some of our nails in wooden boxes now—and just before him and his mother came out here to Oregon, why, I was laying up a brick chimney and it was very warm and the heat from the brick was sucking all the moisture from the mortar so you couldn't place it so I was soaking them in a tub of water there and he was bringing the brick over to the tub and throwing them in the tub. I says, "Eddie, don't throw them in the tub," I says, "lay them in there because you are [58] chipping the corners of them. So, after that he picked them up and laid them in there. But he was with me whenever I was home and around me working—that is, I mean, as little guys will do.

Q. Well, he appeared—I appreciate you are the father, you're probably prejudiced—but he was, so far as you could tell, a bright and alert and normal, healthy boy? A. Very much so, I would say.

Mr. Bosch: I think that's all.

(Testimony of Edward S. Remillard.)

Cross-Examination

By Mr. Dunnavan:

Q. Mr. Remillard, what is your age, sir?

A. I am 37.

Q. 37. This boy was born on what date, I didn't catch that, sir? A. 24th of October, 1951.

Q. 1951? A. Yes.

Q. In Glendive, Montana?

A. In Glendive, Montana.

Q. And he was deserted by his natural parents right after birth, evidently?

A. Well, maybe I should clarify that. They turned him over to us, they delivered the boy to us and then deserted him before we got into court to get legal procedure. [59]

Q. Is this child related to you in any way, Mr. Remillard? A. No, sir.

Q. His natural parents are strangers so far as you—— A. Never seen them before.

Q. Blood relationship?

A. Never seen them before.

Q. I see. Now, you had the child, then, at Glendive, Montana? A. Yes, sir.

Q. From the time he was three days old?

A. Yes, sir.

Q. What is your occupation?

A. I am a carpenter.

Q. Carpenter? A. Yes.

Q. And what has been your education?

(Testimony of Edward S. Remillard.)

A. Eighth grade.

Q. Where did you attend school?

A. Wibaux, Montana.

Q. Where? A. Wibaux, Montana.

Q. Are you a native of Montana?

A. Yes, sir.

Q. And your wife, too?

A. She was born and raised in Montana.

Q. Born and raised there. What education does Mrs. Remillard [60] have?

A. Postgraduate of high school.

Q. Of high school? A. One year.

Q. I gather that this child had not been with you during all of his lifetime from those three days up until the time of this accident, Mr. Remillard?

A. No; I can't give you the exact date. Some time in August him and his mother came out here.

Q. August of what year? A. Of 1954.

Q. Of 1954? A. Yes.

Q. Now, that would mean, then, that he would have been three years old that fall when he came out? A. That's right.

Q. Where were you employed during the time that you lived in Glendive?

A. Well, I was variously employed. I worked for a contractor by the name of Robison and then I had a business of my own. And, the last year, well, the biggest share of the last two years I was employed by Sirhan Construction Company.

Q. Have you always lived at Glendive?

A. No, sir.

(Testimony of Edward S. Remillard.)

Q. What different places have you lived in, say from the [61] time that you left Glendive?

A. Well, you see, I was born and raised a Wibaux. I'd just went back to Glendive in the las five years; that's where my father lives at the pres ent. I—I left Wibaux and I went up in Northern Montana. I went from Billings, went to Billings later on. 1941 I came to Oregon.

Q. No. I am sorry, sir. I am only concerned from the time that the boy came to you three days after birth. You were in Glendive. What other places have you lived besides Glendive since then?

A. Oh, well—The Dalles, Oregon.

Q. You worked in Glendive from 1951 till you came to The Dalles? A. Yes, sir.

Q. When did you come to The Dalles?

A. I would say it was the 27th of January. I am sure.

Q. Yes. Of 1955? A. That's right.

Q. How are you employed now, Mr.——

A. I am employed by The Dalles powerhouse contractors.

Q. You do carpenter work, do you?

A. Yes, sir.

Q. Is your wife employed? A. No, sir.

Q. Were you and Mrs. Remillard separated at the time she came here in 1954? [62]

A. We were at that time.

Q. She brought the child with her?

A. Yes, sir.

Q. Can you tell me what city or town the court

(Testimony of Edward S. Remillard.)

was located in at which this decree of adoption was entered?

A. Glendive, Montana.

Q. At Glendive?

A. And I won't swear for sure but I think it's the 7th District Judicial Court.

Q. Where do you and Mrs. Remillard live now?

A. 514 Liberty in The Dalles.

Q. Is that a home that you own or rent or what?

A. It's a rental.

Q. Rental home?

A. Yes. I am staying with my cousin.

Q. You are staying with a cousin?

A. Yes.

Q. You mean, the cousin owns the home?

A. The cousin is renting the home.

Q. I am sorry.

A. The cousin is renting the home—the apartment.

Q. I see. And you live with the cousin?

A. That's right.

Q. You and Mrs. Remillard?

A. That's right. [63]

Mr. Dunnavan: That's all.

Mr. Bosch: That's all, Mr. Remillard. Thank you. [64]

AGNES H. REMILLARD

plaintiff, being first duly sworn, was examined, and testified as follows:

Direct Examination

By Mr. Bosch:

Q. Will you give us your name, please?

A. Agnes H. Remillard.

Q. And you are the wife of Edward S. Remillard who just testified? A. The wife.

Q. The wife? A. Yes, sir.

Q. And you are Eddie's mother by adoption?

A. Yes, sir.

Q. I will make this as brief as I can, Mrs. Remillard. The boy was with you the day that he died?

A. Yes.

Q. And he had been with you?

A. Had been with me.

Q. Was he generally healthy? A. Yes, sir

Q. Had he had any serious childhood illnesses?

A. No; he had not.

Q. I assume he had the ordinary colds and so forth?

A. Oh, he had a cold once in a while. I think he had the measles. But there was nothing that held him down. [65]

Q. I see. Did he get along well with the other children? A. Very much.

Q. And enjoy playing with them? A. Yes.

Q. There wasn't—his hearing and his ability to see and observe, and what not, was all regular?

A. Yes, sir.

(Testimony of Agnes H. Remillard.)

Q. He hadn't been under the treatment of a doctor for any particular deficiency or what not?

A. No, sir.

Q. I appreciate he was only three years old, but did he even at that age, could he understand your commands to him and requests? A. Oh, yeah.

Q. Did you say yes? A. Yes.

Mr. Bosch: I think that's all, Mrs. Remillard.

Cross-Examination

By Mr. Dunnavan:

Q. Mrs. Remillard, do you mind telling me your age? A. 39.

Q. 39. And you were born and raised in Montana, were you? A. Yes, sir. Denton.

Q. I am sorry.

A. Denton, D-e-n-t-o-n. [66]

Q. Denton, Montana. A. Yes.

Q. Your family were farmers there, were they?

A. Well, my father farmed there for a number of years and then we moved to town and he did work in town.

Q. He worked in town? A. Uh huh.

Q. And when were you and Mr. Remillard married? A. The 1st day of July, 1946.

Q. In Montana? A. Yes, sir.

Q. Is that the first marriage for both of you?

A. No, sir.

Q. Had you been married previously?

A. Yes, sir.

(Testimony of Agnes H. Remillard.)

Q. Do you have any children by any other mar riage? A. No, sir.

Q. Had Mr. Remillard been married previousl before? A. Yes, sir.

Q. Both once? A. Yes, sir.

Q. Once previously? A. That's right.

Q. Were you a widow, then, or were yo divorced? A. Divorced. [67]

Q. Was Mr. Remillard divorced, too?

A. That's right.

Q. Now, were the natural parents of this chil related by blood to you in any way, Mrs. Remi lard? A. No, sir. Absolute strangers.

Q. They were strangers? A. That's righ

Q. They apparently left the child with you an left themselves and disappeared?

A. That's right. We have never heard from the since.

Q. Never heard from them. Now, when was that you took the boy and came to Oregon, Mr Remillard?

A. It was the last week in August, I believe.

Q. Of 1954? A. That's right.

Q. And from what I understand you and Mr Remillard then separated, you were having——

A. Yes, sir.

Q. ——some difficulties, were you not——

A. (Witness nods head.)

Q. ——is that right? A. That's right.

Q. How long did those difficulties go on that le to your separation?

(Testimony of Agnes H. Remillard.)

A. Oh, since the last of July. [68]

Q. Since the last of July? A. Uh huh.

Q. Now, you came out to where your relatives were in Oregon? A. That's right.

Q. Brought the boy with you?

A. That's right.

Q. Did Mr. Remillard have any contact with the boy from that time on till the time of the accident?

A. Oh, yes; we wrote letters.

Q. Pardon me? A. We wrote letters.

Q. I see. But, I mean, did he see or visit the boy? A. No.

Q. Did you return to Montana, for example, during that interval? A. No.

Q. Was he notified of the accident?

A. Yes, sir.

Q. Did he come out here after the accident?

A. Yes, sir.

Q. Right away, was that?

A. Immediately.

Q. I see. Did he remain here, then, or has he since come here?

A. No. He was employed there so he went back.

Q. I see. [69] A. For a while.

Q. And then he has evidently moved out here since the accident? A. Yes, sir.

Q. You are living together now?

A. Yes, sir.

Q. With some cousin of his, is that——

A. Yes, sir. That's right.

Q. What is the name of that cousin?

(Testimony of Agnes H. Remillard.)

A. Daley.

Q. Daley? A. Yes, sir.

Q. Well, is Mr. Remillard related to the Daleys too? A. Yes, sir.

Q. I see. He is a cousin of the Daleys and you are—— A. That is right, sir.

Q. ——and, you are a sister of the Daleys?

A. That is right. I am a sister of Mrs. Daley.

Q. Of Mrs. Daley? A. That is right.

Q. And he is related to the Daleys?

A. That is right.

Q. Which Daley is it that you live with, you and Mr. Remillard? A. Albert.

Q. Albert Daley? [70] A. Yes.

Q. You are not employed now, are you, Mrs Remillard? A. No.

Q. But you had been apparently employed while you were in Oregon? A. Part time.

Q. That is, you were doing housekeeping work

A. Yes; housekeeping and I worked at the schoo a few days, too.

Q. I see. A. Cooked there.

Q. Are you trained for any particular type of employment, Mrs. Remillard?

A. Yes. I have had telegraphic work, Western Union.

Q. Yes. I see. You attended high school in Montana? A. I did.

Q. Where was that? A. In Denton.

Q. That's Denton? A. That's right.

(Testimony of Agnes H. Remillard.)

Q. And have you followed telegraphic work at ll? A. Not since I was out of service.

Q. I see. Since out of what? A. Service.

Q. You mean were you in the——

A. Wacs. [71]

Q. In the Wacs during the last——

A. Yes, sir. That's right.

Q. I see. This was before your marriage to Mr. emillard? A. Yes, sir.

Q. Since your marriage to Mr. Remillard, I ake it, other than doing housekeeping work or this chool work you have been just a housewife?

A. Yes, sir.

Q. Do you have an automobile at all, you and Ir. Remillard?

A. Yes. We have a 1941 Plymouth.

Q. I mean, at the time, however, this accident ccurred you did not have a car, I take it?

A. No. I didn't have one at the time of the accident. The Plymouth was in Montana with him.

Q. Have you left—you and Mr. Remillard left Iontana at all—I mean, you have left there, I suppose, and live here in permanent residence now?

A. Yes.

Q. Do you have any property left in Montana r anything of that sort?

A. Mr. Remillard has a property there, yes.

Q. This house he was talking about?

A. The house that he was living in at the time elongs to him. He built it.

Mr. Dunnavan: I see. That's all. [72]

(Testimony of Agnes H. Remillard.)

Redirect Examination

By Mr. Bosch:

Q. One thing, Mrs. Remillard.

A. Yes, sir.

Q. The Bailiff is handing you a picture whi has been marked a plaintiff's exhibit. Will y please tell us what that is?

A. That is a picture of Eddie.

Q. At about how old?

A. He was about, I imagine, about 26 mont old when that was taken.

Mr. Bosch: That's all. Thank you.

(Witness excused.) [73]

Reporters' Certificate

Ira G. Holcomb and Jack Ellis, official court r porters, hereby certify the foregoing to be a tru full and accurate transcript of our shorthand a stenotype notes taken of the testimony of Flo Daley, Edith Daley, Edward S. Remillard a Agnes H. Remillard, in the above-entitled case o to wit, May 24-25, 1955.

Dated at Portland, Oregon, this 1st day of Se tember, 1955.

/s/ IRA G. HOLCOMB,

/s/ JACK ELLIS,

Official Court Reporters.

[Endorsed]: Filed October 3, 1955. [74]

PLAINTIFF'S EXHIBIT No. 1

The Dalles, Oregon, Dec. 8, 1954.

For Edward Stephan Remillard service.

In Account With

Spencer & Libby Funeral Home
Kelly Avenue at Tenth Street

Casket, Emb. and conduct funeral	$135.00
1 Grave	40.00
1 Cement Liner	33.00
1 Open Grave	15.00
Minister	10.00
Singer	5.00
	$238.00

In the United States District Court
for the District of Oregon

CERTIFICATE OF CLERK

United States of America,
District of Oregon—ss.

I, R. DeMott, Clerk of the United States District Court for the District of Oregon, do hereby certify that the foregoing documents consisting of Complaint; Answer; Order, dated January 13, 1955; Pre-trial Order; Order Authorizing Substitution of Attorneys; Record of Trial Before Court; Memorandum of Decision; Findings of Fact and Conclusions of Law; Judgment; Objections to Findings of Fact and Conclusions of Law and Judgment; Order Overruling Objections to Findings of Fact and Con-

clusions of Law and Judgment; Notice of Appeal Bond for Costs on Appeal; Motion and Stipulatio for Filing Record and Docketing Appeal; Orde Extending Time for Filing Record and Docketin Appeal; Statement of Points on Which Appellant Intend to Rely on Appeal; Stipulation of Recor on Appeal; Order to Transport Original Exhibit and Transcript of Docket Entries constitute th record on appeal from a judgment of said court i a cause therein, numbered Civil 7891, in whic Charles Cox and Albert Earl Jones are the defend ants and appellants and Agnes H. Remillard, Ad ministratrix of the Estate of Edward S. Remillard Deceased, is the plaintiff and appellee; that th said record has been prepared by me in accordanc with the designation of contents of record on appea filed by the appellant, and in accordance with th rules of this court.

I further certify that there is enclosed herewit plaintiff's exhibits No. 1 and 8 and a transcript o Testimony of Floyd Daley, Edith Daley, Edwar S. Remillard and Agnes H. Remillard.

I further certify that the cost of filing the notic of appeal $5.00 has been paid by the appellant.

In Testimony Whereof I have hereunto set m hand and affixed the seal of said court in Portland in said District, this 10th day of October, 1955.

R. DE MOTT,
Clerk;

By /s/ F. L. BUCK,
Chief Deputy.

[Endorsed]: No. 14910. United States Court of Appeals for the Ninth Circuit. Charles Cox and Albert Earl Jones, Appellants, vs. Agnes H. Remillard, Administratrix of the Estate of Edward S. Remillard, Deceased, Appellee. Transcript of Record. Appeal from the United States District Court for the District of Oregon.

Filed October 21, 1955.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 14910

CHARLES COX and ALBERT EARL JONES,

Appellants,

vs.

AGNES H. REMILLARD, Administratrix of th
Estate of Edward S. Remillard, Deceased,

Appellee.

STATEMENT OF POINTS ON WHICH AP
PELLANTS INTEND TO RELY ON AP
PEAL

Come now Charles Cox and Albert Earl Jones
appellants above named, by and through John Ryan
of their attorneys, and for a statement of point
on which they intend to rely on this appeal, say:

1. That the District Court erred in not holdin
unconstitutional, in the present case, the Orego
Wrongful Death Statute (ORS 30.020) under whic
this action was brought for benefit of the estate o
a three-year-old decedent.

2. That the District Court erred by indulging i
speculation in finding and awarding damages herei
and in entering its conclusion of law that appelle
is entitled to recover judgment against appellant
in the sum of $10,000.00 general damages an
$238.00 special damages.

3. That the District Court erred in finding and awarding damages which were excessive and not supported by a sufficiency of the evidence.

Dated this 21st day of October, 1955, at Portland, Oregon.

/s/ JOHN D. RYAN,
Of Attorneys for Appellants.

Service of copy acknowledged.

[Endorsed]: Filed October 25, 1955.

No. 14910

In the United States Court of Appeals for the Ninth Circuit

CHARLES COX and ALBERT EARL JONES,
Appellants,

vs.

AGNES H. REMILLARD, Administratrix of the Estate of Edward S. Remillard, Deceased,
Appellee.

APPELLANTS' BRIEF

On Appeal from the United States District Court
For the District of Oregon

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GLASS-KEYSTONE PRESS

SUBJECT INDEX

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1) The Oregon Wrongful Death Act, even as delimited by judicial construction, is so vague and indefinite as to be unenforcible and void in this case and deprived appellants of Due Process when applied to the alleged pecuniary loss sustained by the estate of a three year old child.

2) The Oregon Wrongful Death Act, as judicially construed, may be valid as to damages sustained by the estates of adults but invalid as applied in the instant case to the estate of a three year old child.

3) A general statute, such as the Wrongful Death Act, may be invalid when applied to one set of facts and valid when applied to other fact situations.

4) The Federal Court judgment on a state Act wherein damages were based not on evidence but on speculation, arbitrarily deprived appellants of their property without Due Process in violation of the Fifth and Fourteenth Amendments.

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1) A judgment based on speculation cannot stand on review.

(2) The trial court erred in computing $10,000.00 general damages by using an award of $5,000.00 approved in a case decided 12 years before and then adding thereto 50% on account of difference in sex and 50% for difference in value of money.

Summary of Argument II .....

Argument II .....

Points of Law III .....

(1) General damages of $10,000. to the estate of the three year old decedent were excessive and not supported by a sufficiency of the evidence.

(2) Since the case was tried to the court without a jury the Appellate Court is not prohibited by the Constitution or by any statute from reversing or reducing the judgment.

(3) Here, there is no dispute as to the evidence on damages and no occasion to judge or weigh the credibility of witnesses. Therefore, this Court is free to draw its own inferences and conclusions as to the proper amount of damages, unrestrained by the "clearly erroneous" test of Rule 52 (a).

(4) Moreover, an incorrect conclusion or a judgment not supported by substantial evidence is a "clearly erroneous" finding to be corrected on appeal.

(5) Furthermore, a finding is "clearly erroneous" although there is evidence to support it when the appellate court, on the entire evidence, is left with a definite and firm conviction that a mistake has been committed.

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) Where damages awarded by the trial judge are in excess of the amount justified by the evidence the Court of Appeals has the right and duty to make its own determination of the proper damages on the evidence in the record if that can reasonably be done.

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No. 14910

In the United States Court of Appeals for the Ninth Circuit

HARLES COX and ALBERT EARL JONES,

Appellants,

vs.

GNES H. REMILLARD, Administratrix
the Estate of Edward S. Remillard,
ceased,

Appellee.

APPELLANTS' BRIEF

On Appeal from the United States District Court
For the District of Oregon

JUDGMENT BELOW

The findings of fact, conclusions of law, and judgment
tered by the District Court and the objections to the same
d the order overruling the objections are on pages 10-16
the transcript of record.

JURISDICTION

The appellee, plaintiff below, is a resident of the Sta of Oregon and is the administratrix of the estate of Edwa S. Remillard, the three year old decedent herein, who at t time of his death was resident of Montana. The appellan defendants below, are residents of the State of Washingto The matter in controversy exceeds, exclusive of interest a costs, the sum of $3,000.00. The foregoing facts are admitt in the pre-trial order which superseded the pleadings. (Tr.

The jurisdiction of the District Court is therefore bas upon diversity of citizenship under 28 USCA. sec. 1332 a the jurisdiction of this Court upon the appellate powers co ferred by 28 USCA, sections 1291, 1294.

STATEMENT OF THE CASE

This is an action based upon the Oregon Wrongf Death Act to recover damages for the death of a three ye old boy. (Oregon Revised Statutes, 30.020). Such a chi left, of course, no surviving spouse or dependents and t action was therefore brought for the benefit of his esta (Tr. 7)

The child was killed on December 6, 1954, when t automobile in which he was riding as a passenger was stru from the rear by a tractor and attached semi-trailer own by appellant Cox and operated by appellant Jones. T

llision happened on U. S. Highway 30 about 1½ miles est of the City of The Dalles, in the State of Oregon. Tr. 11)

The case was tried by the Honorable Claude McColloch, ury having been waived by the parties. (Tr. 10) The trial sulted in a judgment in favor of the plaintiff-administra-x, in the sum of $10,000.00 general damages and $238.00 ecial damages.

From that judgment and the various findings and con-usions of law by the trial judge the appellants have appeal-. The appellants have not appealed from the finding of bility against them. What they are appealing from is the llure of the trial judge to hold the Oregon Wrongful eath Act unenforcible and unconstitutional under the par-ular facts herein; the action of the trial court in basing the dgment upon speculation; the excessiveness of the general mages awarded and the lack of evidence in support there-

QUESTIONS PRESENTED

As pertinent herein, the Oregon Wrongful Death Act ovides that when the death of a person is caused by the rongful act or omission of another an action therefor may maintained by the decedent's personal representatives for e "benefit of the estate of the decedent." The act, stand-g by itself, contains no standard for measuring the damages be recovered. It merely provides for an action "for the

benefit of the estate" where decedent left no spouse or c
pendents and sets a limit of $20,000.00 on the amount
the recovery.

Thus, standing by itself, the Statute would be so vag
and indefinite as to be unenforcible and unconstitution
However, by judicial construction the Oregon Supren
Court has inscribed standards on the Act and given conte
to what is meant by "benefit of the estate." Under such co
struction, damages for the "benefit of the estate" is t
"pecuniary loss" to the estate which is based upon the pro
able net savings that the decedent would have accumulat
at the termination of his normal life expectancy. Also, und
such judicial construction, the "pecuniary loss" to the esta
is based upon a number of court-enumerated factors inclu
ing earning capacity, ability to make money, and eviden
of thriftiness and expenditure.

Such factors can provide a standard for the estate of
adult or older child and appellants do not question the co
stitutionality of the Act as applied in such cases. On the oth
hand, such factors are non-existent in the case of the thr
year old decedent in this case and therefore the appellan
urge that the Act, without being delimited by judici
standards herein was void for vagueness.

The Oregon Supreme Court has conceded that damag
awarded the estate of a seven year old girl would be specul
tive but the constitutionality of the Act, as so applied, w

ɔt there, nor has it ever been, before our State court for ecision.

The constitutionality question thus presented herein is ıe of first impression.

This case was tried without a jury. There was no conflict to the evidence on damages and all that evidence is now efore this Court on review. Thus, if the validity of the Act upheld, this would then be a proper case for this appellate ɔurt to pass upon the excessiveness of the general damages varded.

Summarized below are the issues on this appeal:

I.

Where the Oregon Wrongful Death Act is vague and definite as applied to damages to be awarded thereunder the estate of a three year old boy is such Act unenforcible ıd void for vagueness?

II.

Where a judgment for general damages is necessarily ısed on speculation should such judgment be upheld on ɔpeal?

III.

Was the assessment of general damages, in the sum of 0,000.00 for the benefit of the estate of the three year old

decedent, excessive and not supported by a sufficiency
the evidence?

SPECIFICATIONS OF ERROR

The foregoing questions presented on this appeal a
embraced within the following specifications of error:

1. That the District Court erred in not holding uncons
tutional, in the present case, the Oregon Wrongful Dea
Statute (ORS 30.020) under which this action was broug
for benefit of the estate of a three year old decedent. (Tr. 44

Said error consisted of the trial court's failure to ho
the Act void for vagueness under the facts of this cas
(Tr. 15)

2.That the District Court erred by indulging in specul
tion in finding and awarding damages herein and in ente
ing its conclusion of law that appellee is entitled to recov
judgment against appellants in the sum of $10,00.00 gener
damages and $238.00 special damages. (Tr. 44)

Said error consisted of awarding general damages th
were necessarily based on speculation as to what "pecunia
loss" would be sustained by a three year old child mar
years hence. (Tr. 15)

3. That the District Court erred in finding and awardin
damages which were excessive and not supported by a su
ficiency of the evidence. (Tr. 45)

Said error consisted of awarding $10,000.00 general amages to the estate of the three year old decedent which nder the evidence, or rather lack of evidence, was excesve. (Tr. 15)

POINTS OF LAW

I.

(1) The Oregon Wrongful Death Act, even as delimited y judicial construction, is so vague and indefinite as to be nenforcible and void in this case and deprived appellants f Due Process when applied to the alleged pecuniary loss ustained by the estate of a three year old child.

Bell v. State Industrial Accident Commission, 157 Or. 653, 74 P. 2d 55;

Fullerton v. Lamm, 177 Or. 655, 163 P. 2d 941, rehearing den., 165 P. 2d 63;

Vinton v. Hoskins, 174 Or. 106, 147 P. 2d 892;

A. B. Small Co. v. American Sugar Refining Co., 267 U. S. 233, 45 S. Ct. 295, 69 L. Ed. 589;

Champlin Refining Co. v. Corporation Commission, 286 U. S. 210, 52 S. Ct. 559, 76 L. Ed. 1062, 86 A.L.R. 403;

Winters v. New York, 333 U. S. 507, 68 S. Ct. 665, 92 L. Ed. 840.

(2) The Oregon Wrongful Death Act, as judicially conrued, may be valid as to damages sustained by the estates

of adults but invalid as applied in the instant case to t
estate of a three year old child.

Schleiger v. Northern Terminal Co., 43 Or. 4, 72 P. 32

Carlson v. Oregon Short Line Ry. Co., 21 Or. 450, 28
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Norlund v. Lewis & Clark Ry. Co., 141 Or. 83, 15 P.
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Hansen v. Hayes, 175 Or. 358, 379-391, 154 P. 2d 2(
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The Princess Sophia (D.C.W.D. of Wash.) 35 F.
736, 36 F. 2d 591, 9 Cir., 1932, 61 F. 2d 339, ce
den. 288 U. S. 604, 53 S. Ct. 396, 77 L. Ed. 980.

Cases, supra Point I (1).

(3) A general statute, such as the Wrongful Death A
may be invalid when applied to one set of facts and va
when applied to other fact situations.

Dahnke-Walker Milling Co. v. Bondurant, 257 U.
282, 42 S. Ct. 106, 66 L. Ed. 239.

(4) The Federal Court judgment on a state Act wher
damages were based not on evidence but on speculati
arbitrarily deprived appellants of their property witho
Due Process in violation of the Fifth and Fourteenth Amer
ments.

12 *Am. Jur.,* 283 et. seq., 313, "Constitutional Law", Secs. 586, 620;

15 *Am. Jur.* 795 et seq. "Damages," Sec. 356;

Oregon-Washington R. & Nav. Co. v. Branham, 9 Cir., 1919, 259 F. 555, 38 A.L.R. 389;

Western Union Telegraph Co. v. Ramsey, 261 Ky. 657, 88 S.W. 2d 675, 103 A.L.R. 541.

SUMMARY OF ARGUMENT

I.

The Oregon Wrongful Death Act provides that in case wrongful death the personal representative of the dece- ent may maintain an action against the wrongdoer "for the enefit of the estate of the decedent" and limits the maxi- um recovery to $20,000. (ORS 30.020).

The statute itself prescribed no standards for deter- ining the damages to be awarded for "the estate of dece- ent." A statute, which on its face appears void for vague- ess, may be saved from that vice, in some instances, by dicial construction wherein standards are prescribed. In is connection, the Oregon Supreme Court has construed amages for "the benefit of the estate" to be limited to ecuniary loss" to the estate which in turn is measured by number of criteria including earning capacity, ability to ake money, evidence of thriftiness, and evidence of ex- enditures. The judicial standards thus inscribed on the Act

redeem it from invalidity for vagueness in most cases su
as those involving adults. However, in cases involving
ceased children of tender years, such as the three year
child herein, the delimitation by judicial construction is n
existent because of the lack of evidence of earning capac
ability to make money, thriftiness and habits of expenditu
In this latter type of case, now before this Court, the Ac
so vague as to be void and unenforcible and any dama
allowed thereunder must be speculative as the Oregon
preme Court has already conceded. To enforce such an
and judgment would deprive appellants of Due Proce

ARGUMENT

The Oregon Wrongful Death Act provides:

I

"When the death of a person is caused by the wro
ful act or omission of another, the personal represen
tives of the decedent, for the benefit of the survivi
spouse and dependents and in case there is no survivi
spouse or dependents, then for the benefit of the est
of the decedent, may maintain an action against
wrongdoer, if the decedent might have maintained
action, had he lived, against the wrongdoer for an
jury done by the same act or omission. Such action sh
be commenced within two years after the death, a
damages therein shall not exceed $20,000, which m
include a recovery for all reasonable expenses paid
incurred for funeral, burial, doctor, hospital or nursi
services for the deceased." (ORS 30.020)

The three year old decedent in this case naturally left no urviving spouse or dependents and the action was therefore lled by his personal representative for the benefit of his state. (Tr. 7)

On its face the Act is vague as to what is meant by damges "for the benefit of the estate of the decedent." In a umber of decisions the Oregon Supreme Court has attempt-d to remedy this vagueness by presenting standards for the amages that might be recovered thereunder. In substance, he Oregon Court has held that such damages do not include ny award for pain and suffering of the decedent or for olatium or the grief and anguish of surviving relatives. urther, the Oregon Court has held such damages to be the pecuniary loss" to the estate and has ruled that such "pecu-iary loss" is the net savings decedent would have accumu-ted in his estate if he had lived out his normal life ex-ectancy. In determining such probable net savings the Ore-on Court has held that the trier of facts should consider he decedent's (1) probable length of life; (2) his capacity o labor; (3) his earning capacity and ability to make noney; (4) his habits of living and expenditure and (5) is thriftiness. *Carlson v. Oregon Short Line Ry. Co.,* 21 Or. 50 28, P. 497; *Hansen v. Hayes,* 175 Or. 358, 379-391, 154 . 2d 202, 210-215. Damages for pecuniary loss to the estate re to be reduced to present value and in the case of uneman-ipated minor decedents the pecuniary loss to their estates hall not be deemed to commence until after the time they

would have reached majority if they had lived. *Nordlun*
Lewis & Clark Ry. Co., 141 Or. 83, 15 P. 2d 980; *Hanse*
Hayes, supra; *Schleiger v. Northern Terminal Co.,* 43 O
72 P. 324; *Lane v. Hatfield,* 173 Or. 79, 143 P. 2d 230.

The criteria enumerated above for determining "p
niary loss" to the estate was set down by the Oregon C
with reference to adult decedents. Appellants do not
that the Act, as delimited by the judicial standards so
scribed on it, would be void for vagueness as applie
adult decedents. But as to a three year old child the judi
standards of damage affixed to the Act cannot save it f
being void for vagueness. This is so because such judi
standards, which have meaning and content for an adul
an older child, are totally devoid of meaning, content
application as to a three year old child. Such a child as
one in this case had (1) no capacity to labor; (2) no e
ing capacity or ability to make money; (3) no habit
living or expenditure and (4) no thriftiness. Thus there
no factual basis upon which to predicate a "pecuniary l
to the estate. The above contention is borne out by the
ing of the Federal District Court for the Western Dis
of Washington in *The Princess Sophia,* supra, 35 F. 2d
There the court was applying the same "benefit of est
rule under the Alaska Wrongful Death Act and ruled
"the damage to the estate would therefore be the value of
life to the estate, measured by the earning capacity, thr
ness, and probable length of the life of the deceased."

2d at 738). The Court also emphasized that the increased ts of living to a widow, love, affection, equal distribution justice or the dictates of humanity would not warrant the urt in finding a pecuniary loss where none was shown by evidence. (35 F. 2d at 740). Further it was held:

> "The Court could not in good conscience say that a party 35, 40, 50, or 60 years of age, who has not shown some result of saving and saving habit and position of expectancy, in all reasonable probability would leave an estate of present worth at the end of life expectancy. Health, earning capacity, and employment, contributions to charity or 'living well', being a 'good fellow,' without some evidence of accumulation and saving habit, does not create a presumption of itself to support such finding." (35 F. 2d at 740)

So far as appellants have been able to ascertain there four reported Oregon cases in which damages have been owed in a wrongful death action to a personal representae for the benefit of a decedent minor's estate.

However, in none of these cases was the decedent of such ender age as the three year old decedent herein and in ne of these cases did the award exceed $5,000.00 general nages, which would be half that allowed here.

Moreover, in none of these cases did the appellants chalge the vagueness or constitutionality of the Act.

These cases are: *Rekdahl v. Cheney,* 134 Or. 251, 293 P.

412; *Lane v. Hatfield,* 173 Or. 79, 143 P. 2d 230; *Cowg*
Adm'r v. Boock, Adm'r. 189 Or. 282, 218 P. 2d 445 a
Schleiger v. Northern Terminal Co., 43 Or. 4, 72 P. 324.

In the *Rekdahl* case a jury award of $2,500. to the esta
of a nine year old boy was affirmed.

In the *Lane* case a jury award of $5,000. to the estate
a seven year old girl was affirmed.

In the *Cowgill* case a jury award of $5,000. to the esta
of a 17 year old boy was affirmed where the boy was kill
as the proximate result of his father's wilful misconduct.

In the *Schleiger* case a jury award of $1,225. to the esta
of an 11 year old boy was affirmed.

It is significant to note that in *Lane v. Hatfield,* supr
the Oregon Supreme Court in dealing with the damages
be awarded the estate of a seven year old girl conceded th
the standard of awarding damages therein was speculativ
vague and uncertain. On this point the Court noted:

> "At best, whether determined by a jury, or by the cou
> without a jury there is much speculation attendant up
> fixing the amount due to plaintiff."
>
> * * *
>
> "We are also influenced by reason of the speculati
> nature of appraising the damages in a case of this cha
> acter." (173 Or. at 88; 143 P. 2d at 234)
>
> * * *
>
> "The rule, that the measure of recovery by a person
> representative for the wrongful death of his decede

is the value of the life of such decedent if he had not come to such untimely end, has been termed vague, uncertain and speculative if not conjectural. It is, however, the best that judicial wisdom has been able to formulate." (173 Or. at 89, 143 P. 2d at 234).

It is also significant to note that in *Lane v. Hatfield,* the pellant did not challenge the constitutionality of the Ore-n Wrongful Death Act. Therefore, there was no occasion r the Oregon Court to consider the validity of the Act as plied to the assessment of damages to the estate of a ung child.

However, in the case at bar, appellants have challenged e constitutionality of the Act as applied to the facts herein. ne constitutional principles upon which appellants rely are scussed below:

(1) The Act is so vague and indefinite when applied to mages to be allowed "for the benefit of the estate" of the ree year old decedent herein as to be unenforcible and id for vagueness. See cases cited supra Pont I (1).

A statute which is vague and indefinite is unconstitu-onal whether the statute provides for civil remedies or iminal sanctions. *A. B. Small Co. v. American Sugar Re-ning Co.,* 267 U. S. 233, 45 S. Ct. 295, 69 L. Ed. 589.

Judicial construction can sometimes save a statute from e vice of void for vagueness. *Winters v. New York,* 333

U. S. 507, 68 S. Ct. 665, 92 L. Ed. 840. But any judicial
limination on the vagueness of the Act, as we have se
does not apply in the case of the three year old deced
herein and the Act is too uncertain to be enforcible in
case and if applied herein would be void for vagueness. *
v. State Industrial Accident Commission, 157 Or. 653, 7
2d 55 and other cases cited supra Point I (1).

In *Bell v. State Industrial Accident Commission,* su
a provision of the Oregon Workmen's Compensation
was held inoperative and void for vagueness. That provis
allowed the Industrial Accident Commission to recover
judgment from an employer the cost to the Commission
a workman's claim for injury received before the emplo
had filed with the Commission a notice of engaging i
hazardous occupation. The Court held that the standa
set up to determine the cost of the claim to the Commiss
was not sufficiently definite upon which to base a v
judgment against an employer. On this point the Co
held,

> "In a word, the legislature has enacted a statute wh
> provides for the recovery of an invalid judgment.
> statute, so interpreted, is infected with the vice of
> certainty and indefiniteness, and must be pronoun
> inoperative and void: 1 Lewis' Statutory Construct
> (2d Ed.) #86." (157 Or. at 661, 74 P. 2d at 58)

Likewise in the case at bar the Oregon Wrongful De
Act and the judicial standards inscribed on it to meas

nages are inoperative and void as applied to this case of estate of a three year old child. See other cases cited ra Point 1 (1).

(2) A general statute may be invalid when applied to set of facts and valid when applied to other situations. *hnke-Walker Milling Co. v. Bondurant,* 257 U. S. 282, S. Ct. 106, 66 L. Ed. 239.

(3) Thus, the Oregon Wrongful Death Act, as judicial-interpreted, may be valid as to damages sustained by ites of adults or older minors because the standards in-bed on it are there applicable but invalid in the instant e because those standards are non-existent in the case of estate of the three year old child herein. See cases supra nt I (2) and especially *The Princess Sophia* (D.C.W.D. Wash.) supra, 35 F. 2d 736.

(4) A Federal Court judgment, premised on a state ute wherein the damages awarded are based not on evi-nce but on speculation, arbitrarily deprived appellants their property without Due Process in violation of the th and Fourteenth Amendments to the United States nstitution.

The requirements of due process are binding on both Federal and State governments and cover the exercise both legislative and judicial functions. As will presently shown in the next section of this Brief, the judgment ein for $10,000.00 general damages was necessarily based

on speculation and not on evidence. Such a judgment b
Federal court and based on a State Statute violates the D
Process guaranteed by the Fifth and Fourteenth Ame
ments. See cases and authorities supra Point I (4).
Oregon-Washington R. & Nav. Co. v. Branham, 9 Cir., 19
259 F. 555, 557, 38 A.L.R. 389, this Court approved the ba
principle that "Where actual pecuniary damages are soug
some evidence must be given, showing their existence a
extent. If that is not done, the jury cannot indulge in
arbitrary estimate of their own." See also *Western Un*
Telegraph Co. v. Ramsey, 261 Ky. 657, 88 S.W. 2d 675,
A.L.R. 541.

POINTS OF LAW

II

(1) A judgment based on speculation cannot stand
review.

Oregon-Washington R. & Nav. Co. v. Branham, 9 C
1919, 259 F. 555, 38 A.L.R. 389;

The Princess Sophia, (D.C.W.D. of Wash.), 35 F.
736; 36 F. 2d 591; 9 Cir., 1932, 61 F. 2d 339, c
den. 288 U. S. 605; 53 S. Ct. 396, 77 L. Ed. 980.

(2) The trial court erred in computing $10,000. gene
damages by using an award of $5,000.00 approved in a c
decided 12 years before and then adding thereto 50%

ount of difference in sex and 50% for difference in value
noney.

Memorandum of Decision, (Tr. 10)
Lane v. Hatfield, 173 Or. 79, 143 P. 2d 230

SUMMARY OF ARGUMENT

II

The trial judge's award of $10,000. general damages for
estate of the three year old decedent was necessarily
ed on speculation and not on evidence or any factual
eria. Such a judgment should not be affirmed on review.

ARGUMENT

II

All the evidence on damages has been brought up on this
peal. There is no conflict on that evidence. It can all be
d by this Court in a matter of minutes as it is set forth in
thin transcript of record.

The lack of evidence herein on damages was not the
ult of any lack of diligence or ability on the part of
nsel for the appellee. On the contrary, the lack evidence
prove "pecuniary loss" to the estate of the three year old
ld arose from the inherent nature of the case.

In essence, the only evidence offered to prove "pecuni loss" to the decedent's estate was that decedent was a healt bright, alert, normal boy of three years of age, who pla well with other children.

Upon the conclusion of the trial, the judge according the memorandum of decision that he entered, appeared to at a loss as to what amount of general damages to ass What he did in arriving at a figure of $10,000.00 was take, as the starting point, the sum of $5,000. which was sum awarded the estate of a seven year old girl in the c of *Lane v. Hatfield,* 173 Or. 79, 143 P. 2d 230 (1943), cided some 12 years before by the Oregon Supreme Co To this figure of $5,000.00 picked out from the *Lane* c the trial judge added 50% because of a difference of and another 50% for the difference in the value of mo between 1943 and 1955, or a total of $10,000.00.

The trial judge's Memorandum of Decision is prin verbatim, below:

> "In Lane v Hatfield (1943) the Oregon Supreme Co approved a judgment of $5,000.00 in the case o seven-year-old girl. I have arrived at the amount allo ed here by adding 50% on account of the difference sex and 50% difference in value of money, t $10,000.00." (Tr. 10)

As previously noted, there was no evidence on a numb of the essential criteria laid down by our Supreme Court

termining "pecuniary loss" to the estate. There was evi-
nce of the decedent's age, his life expectancy and that he
s healthy, alert and normal. This evidence would not
ovide a factual basis for saying that $10,000 was the pres-
t value of the net estate he would have accumulated had
lived out his life.

There was no evidence on such essential factors as earn-
g capacity, ability to make money, expenditures and thrifti-
ss and thus the judgment for $10,000. was necessarily
sed on speculation. *The Princess* Sophia, supra (D.C.-
.D. of Wash.), 35 F. 2d 736; *Lane v. Hatfield,* 173 Or.
, 143 P. 2d 230; *Oregon-Washington R & Nav. Co. v.*
anham, 9 Cir., 1919, 259 F. 555, 38 A.L.R. 389.

POINTS OF LAW

III

(1) General damages of $10,000. to the estate of the
ree year old decedent were excessive and not supported by
sufficiency of the evidence.

Rekdahl v. Cheney, 134 Or. 251, 293 P. 412;

Lane v. Hatfield, 173 Or. 79, 143 P. 2d 230;

Cowgill Adm'r v. Boock, Adm'r. 189 Or. 282, 218 P. 2d 445;

Schleiger v. Northern Terminal Co., 43 Or. 4, 72 P. 324;

United States v. Guyer, 4 Cir., 1954, 218 F. 2d 266.

(2) Since the case was tried to the court without a j
the Appellate Court is not prohibited by the Constitutio
by any statute from reversing or reducing the judgment.

United States v. United States Gypsum Co., 333 U
364, 68 S. Ct. 525, 92 L. Ed. 746;

See also: *Wakefield Co. v. Sherman, Clay* & *Co.,* 141
270, 17 P. 2d 319.

(3) Here, there is no dispute as to the evidence on d
ages and no occasion to judge or weigh the credibilit
witnesses. Therefore, this Court is free to draw its own
ferences and conclusions as to the proper amount of d
ages, unrestrained by the "clearly erroneous" test of R
52 (a).

Kuhn v. Princess Lida of Thurn & *Taxis,* 3 Cir., 19
119 F. 2d 704;

Pacific Portland Cement Co. v. Food Machinery
Chemical Corp., 9 Cir., 1949, 178 F. 2d 541;

Hardt v. Heller Bros. Co., 3 Cir. 1948, 171 F. 2d 6
Sears, Roebuck & *Co. v. Johnson,* 3 Cir., 1955, 219 F.
590;

Aetna Casualty & *Surety Co. v. De Maison,* 3 Cir., 19
213 F. 2d 826;

Orvis v. Higgins, 2 Cir., 1950, 180 F. 2d 537, cert. d
340 U. S. 810, 71 S. Ct. 37, 95 L. Ed. 595;

Home Indemnity Co. of New York v. Standard Acc.
Co., 9 Cir., 1948, 167 F. 2d 919.

(4) Moreover, an incorrect conclusion or a judgment not pported by substantial evidence is a "clearly erroneous" ding to be corrected on appeal.

Kuhn v. Princess Lida of Thurn & Taxis, 3 Cir., 1941, 119 F. 2d 704;

Pacific Portland Cement Co. v. Food Machinery & Chemical Corp., 9 Cir., 1949, 178 F. 2d 541;

Magidson v. Duggan, 8 Cir., 1954, 212 F. 2d 748; cert. den. 348 U. S. 883, 75 S. Ct. 124, 99 L. Ed. 78.

(5) Furthermore, a finding is "clearly erroneous" al- ough there is evidence to support it when the appellate urt, on the entire evidence, is left with a definite and firm nviction that a mistake has been committed.

United States v. United States Gypsum Co., 333 U. S. 364, 68 S. Ct. 525, 92 L. Ed. 746;

Pacific Portland Cement Co. v. Food Machinery & Chemical Corp., 9 Cir., 1949, 178 F. 2d 897;

Gindorff v. Prince, 2 Cir., 1951, 189 F. 2d 897;

Hardt v. Heller Bros. Co., 3 Cir., 1948, 171 F. 2d 644.

(6) Where damages awarded by the trial judge are in cess of the amount justified by the evidence the Court of peals has the right and duty to make its own determina- n of the proper damages, if any, on the evidence in the cord if that can reasonably be done.

United States v. Guyer, 4 Cir., 1954, 218 F. 2d 266;

Kuhn v. Princess Lida of Thurn & Taxis, 3 Cir., 19
119 F. 2d 704;

Hardt v. Heller Bros. Co., 3 Cir., 1948, 171 F. 2d 644

SUMMARY OF ARGUMENT

III

In the preceding sections of this Brief, appellants h
set forth what they believe are cogent reasons for rever
the judgment and dismissing the action herein, except a
the special damages allowed, because the Oregon Wron
Death Act as applied herein was void for vagueness
because the award of $10,000. general damage was neces
ly based on speculation.

Proceeding further we now come to the proposition t
in any event, the judgment for $10,000. general dama
was excessive and not supported by substantial evide
This case was tried to the court without a jury. Therefore
this appeal this Court is not barred by the Seventh Am
ment to the Constitution or by any statute from reversin
reducing the judgment for excessiveness.

Also, in reviewing the judgment this Court is not lim
by the "clearly erroneous" test of Rule 52 (a) because h
there was no conflict as to the evidence on general dama
and no occasion to weigh the credibility of witnesses on r
conflicting testimony. Furthermore, any incorrect conclu

to the amount of general damages or a judgment not supported by substantial evidence is a "clearly erroneous" finding to be corrected on appeal. In addition, a finding is "clearly erroneous" even if there is evidence to support it when the reviewing court, on the entire record, is left with the definite and firm conviction that a mistake has been made. Here to the case at bar all the evidence pertaining to the damages alleged is before this Court on appeal. In such a case where the damages assessed below are in excess of the amount justified by the evidence the Court of Appeals has the right to determine the proper amount of damages, if any, to be allowed.

ARGUMENT

III

As previously seen, the $10,000. award herein was twice as large as the largest amount ever awarded to the estate of a minor in any prior reported Oregon case. Added to that is the fact that in none of these prior cases was the minor of such a tender age. We have also pointed to the lack of evidence to show the "pecuniary loss" to the estate of the child in this case. Furthermore, an examination by this Court of the sparse transcript of record will readily demonstrate the insufficiency of the evidence adduced to support the judgment.

There is no conflict on the evidence of alleged damages and therefore this is not a case where the trial judge would

be in a better position than the appellate court to weigh evidence or judge the credibility of the witnesses. Thus, Court is free to draw its own inferences and conclusions a the proper amount of damages unrestrained by the "cle erroneous" test of Rule 52 (a). Nor is there any constitut al or statutory prohibition to prevent this Court from re sing or reducing the judgment. These principles are v established in a number of cases, some of which will nov discussed.

United States v. United States Gypsum Co., 333 U 364, 68 S. Ct. 525, 92 L. Ed. 746, was a civil action to rest violations of the Sherman Act. The trial court's action in missing the complaint and entering findings in favor of fendants was reversed by the Uinted States Supreme Co This case is often quoted for its interpretation of the "cle erroneous" test of Rule 52 (a), which will be referre later in this Brief, and is likewise often cited for the dist tion to be made on appeal between jury and non-jury ca On this latter point the Supreme Court emphasized:

> "Since judicial review of findings of trial courts d not have the statutory or constitutional limitations judicial review of findings by administrative agen or by a jury, this Court may reverse findings of fact a trial court where 'clearly erroneous' " (333 U. S 395)

It is also the rule under State appellate practice in Ore that the Oregon Supreme Court is unrestrained by State C

tutional or statutory provisions in reversing or reducing noney judgment of the trial court sitting without a jury. *akefield Co. v. Sherman, Clay & Co.,* 141 Or. 270, 17 P. 319.

Kuhn v. Princess Lida of Thurn & Taxis, 3 Cir., 1941, 9 F. 2d 704, was an action in quantum meruit by a tax at-ney to recover compensation for services rendered the fendant. The case was tried without a jury and plaintiff s allowed $8,500. as reasonable compensation plus non-sputed expense items of $326.65. The question on appeal s whether the trial judge had erred in fixing appellee's mpensation at $8,500. The third Circuit held the award of ,500. to be excessive and reduced it to $2,500. There was nflicting testimony by witnesses for the respective parties to the reasonable worth of the services, witnesses for the aintiff having estimated the worth of the services at 5,000. and $30,000. while defendant's witnesses estimated e value of the services at $1,500. and $2,000.

In reversing the trial court and reducing the general ard from $8,500. to $2,500., the appellate court noted that le 52 (a) does not entrench with the "clearly erroneous" st "the inferences and conclusions drawn by the trial court om its fact findings." (119 F. 2d at 705). Further, that the pellate court remains free to draw the ultimate inferences d conclusions which, in its opinion, the findings reason-ly induce. (119 F. 2d at 706) The Court also held that . . . The sufficiency of the evidence to sustain a trial court's

conclusion or finding of an ultimate fact remains appropr matter for an appellate court's consideration . . . An incor conclusion by a trial court qualifies as a 'clearly errone finding, for the correction whereof on appeal Rule 52 specifically provides." (119 F. 2d at 706)

The case at bar is a stronger instance for the reversal reduction of the trial court's general award because un the *Kuhn* case there is no conflict of testimony herein a alleged damages and all that remains is the bare drawin an inference or conclusion as to the ultimate fact of amount of the award, if any.

The *Kuhn* decision has been cited and relied upo numerous cases. See for example: *Pacific Portland Cen Co. v. Food Machinery & Chemical Corp.,* 9 Cir., 1949, F. 2d 541; *Hardt v. Heller Bros. Co.,* 3 Cir., 1948, 17 2d 644.

In *Pacific Portland Cement Co. v. Food Machiner Chemical Corp.,* supra, this Court quoted with approval f the *Kuhn* case to the effect that Rule 52 (a) does not ope "to entrench with like finality the inferences or conclusi drawn by the trial court from its fact findings." This C also held that an appellate court may draw its own inferen from undisputed facts. (178 F. 2d at 548)

As in the *Kuhn* case the sole question on appeal in *H v. Heller Bros. Co.,* supra, was the alleged excessiveness the trial judge's award in quantum meruit for services re

ed. There the appellate court held that the award of 5,000. was excessive and that, on the entire evidence, 5,000. would be ample compensation and the judgment is accordingly reduced on appeal.

For additional cases holding that the "clearly erroneous" t does not apply where there is no dispute as to basic facts d the question is what inference, conclusion or ultimate ct should be drawn see: *Sears Roebuck & Co. v. Johnson,* 3 r., 1955, 219 F. 2d 590; *Aetna Casualty & Surety Co. v. Maison,* 3 Cir., 1954, 213 F. 2d 826; *Home Indemnity Co. New York v. Standard Acc. Ins. Co.,* 9 Cir., 1948, 167 F. 919.

The Second Circuit in *Orvis v. Higgins,* 2 Cir., 1950, 180 2d 537, supra, in discussing the effect of a case tried with- t a jury held:

> "It follows that evidence sufficient to support a jury verdict or an administrative finding may not suffice to support a trial judge's finding. So in the instant case, perhaps, on the record evidence, we might have affirmed a jury's verdict or an administrative agency's finding in plaintiff's favor. That, however, we need not decide. For here the finding is that of a trial judge, and the evidence consists in large part of facts neither side disputes, in circumstances such that the trial judge's evaluation of credibility becomes unimportant." (180 F. 2d at 540)

If despite the foregoing cases, it should be felt that "clearly erroneous" test of Rule 52 (a) is applicable her then it is submitted that from the record now before t Court the trial judge's finding or conclusion on gene damages is "clearly erroneous." This is so because a ju ment not supported by substantial evidence is clearly roneous and should be corrected on appeal. See Point (4) supra. This is also so because a finding is "clearly roneous" even if there is evidence to support it when appellate court, on the entire evidence, is left with a defi and firm conviction that a mistake has been made. See ca cited supra Point III (5). The language of this principle set forth in *United States v. United States Gypsum* supra, 333 U. S. 364, 395, in the following form, and been repeated with approval in many subsequent cases:

> "A finding is 'clearly erroneous' when although th is evidence to support it, the reviewing court on entire evidence is left with the definite and firm c viction that a mistake has been committed."

In preceding sections of this Brief we have tried to po out that the trial court erred in awarding any general da ages herein. We now proceed to the situation where the pellate court may feel that some general damages sho have been awarded but that the damages set by the t judge were in excess of the amount justified by the evider In this latter type of situation the reviewing court sho

ake its own ultimate finding on the amount of damages operly allowable where on evidence in the record this can asonably be done. The appellate court is free to draw its vn inferences, conclusions and determination of ultimate cts and should do so where the case was tried, without a ty; and the evaluation of credibility is non-existent or unportant; and there is no conflict as to basic facts; and all the evidence on alleged damages is before the court for view.

Appellate courts have recognized this method of review a number of cases including *United States v. Guyer,* 4 Cir., 54, 218 F. 2d 266; *Kuhn v. Princess Lida of Thurn & axis,* 3 Cir., 1941, 119 F. 2d 704 and *Hardt v. Heller Bros.).,* 3 Cir., 1948, 171 F. 2d 644.

United States v. Guyer, supra, involved a number of acons tried to the court without a jury under the Federal orts Claims Act to recover for injuries and wrongful aths caused by the crash of a government airplane into a me. On appeal, the Fourth Circuit held that when a findg as to damages was clearly erroneous because in excess of y amount justified by the evidence it was the duty of the ppellate court to "make a finding ourselves on the evidence the record if this can reasonably be done." (219 F. 2d at 58). The Court then went on to affirm some of the judgents for damages and also reduced some of the judgments. mong the judgments materially reduced were those awardg $8,000. to parents for the loss of services resulting from

the death of a daughter 6½ years old and a similar amo of $8,000. for the loss of services resulting from the d of a second daughter, age 8 weeks. Such awards were h excessive and were reduced to $5,000. each. Another ju ment was held excessive and reduced from $30,000 $15,000. for injuries sustained by a woman occupant of home struck by the ill-fated plane.

As we previously saw the Circuit Court materially duced judgments in *Kuhn v. Princess Lida of Thurn & Ta* supra, from $8,500. to $2,500. and in *Hardt v. Heller E Co.,* supra, from $45,000. to $15,000. In *Gindorff v. Pri* 2 Cir., 1951, 189 F. 2d 897, the Second Circuit went fur and set aside the trial court's judgment for $38,500. and missed the action because the reviewing court felt the trial judge, on the entire evidence, had committe mistake.

It is respectfully submitted that the trial judge erre allowing a judgment herein for $10,000. for alleged "p niary loss" to the estate of the three year old deceden appellants have shown in this Brief. However, if it be h that some general damages should be allowed then the of $10,000. is in excess of the amount justified by the dence and should be materially reduced.

CONCLUSION

The Oregon Wrongful Death Act, shorn of standa by which to assess the alleged "pecuniary loss" to the es

the three year old decedent herein, was too indefinite to enforcible and was void for vagueness under the particr facts of this case.

The appellants, who were defendants in the trial court, re entitled to have this case (including the amount of mages) decided on its own merits and on the evidence ein adduced.

Instead, the trial judge reached back to a different case cided 12 years before; took the $5,000. sum awarded in t case and added thereto 50% for difference in sex and % for difference in value of money, or a total of $10,000., d thus decided the general damages allowed against pellants in this case. Such a judgment was arbitrary and s based on speculation and not on the evidence introduced this trial.

Regretfully, the law allows nothing for solatium or the ef and anguish of parents caused by the death of a child. the other hand, "pecuniary loss" in this case to the estate the three year old child could not factually be proved.

For the foregoing reasons that part of the judgment owing general damages to the estate of the child should be aside. If the contrary be held by this Court, then it is omitted that the judgment of the trial judge for $10,000. neral damages was excessive and beyond the amount justed by the evidence.

The evidence on damages is not in conflict and it all here before the reviewing court. Under such circu stances, this Court has the power and right to determine itself, the proper amount of damages, if any, that should allowed herein.

Respectfully submitted,

John D. Ryan,
James J. Kennedy,
Ryan & Pelay,
John Gavin,
Edwin L. Dunnavan
Attorneys for Appellants.

Addresses of
Counsel for Appellants:

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John Gavin
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No. 14911

United States

Court of Appeals

for the Ninth Circuit

BARBARA ARRAMONE, a minor, by and through her guardians ad litem, DOMINICK N. ARRAMONE and MARY I. ARRAMONE,

Appellants,

vs.

JOHN A. PROWSE, as administrator of the Estate of Alvin Prowse, also known as Alvin I. Prowse, Deceased,

Appellee.

Transcript of Record

Appeal from the United States District Court for the Northern District of California, Northern Division

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif. —1-30-56

No. 14911

United States
Court of Appeals
for the Ninth Circuit

ARBARA ARRAMONE, a minor, by and through her guardians ad litem, DOMINICK N. ARRAMONE and MARY I. ARRAMONE,

Appellants,

vs.

OHN A. PROWSE, as administrator of the Estate of Alvin Prowse, also known as Alvin I. Prowse, Deceased,

Appellee.

Transcript of Record

ppeal from the United States District Court for the Northern District of California, Northern Division

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

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T. J. NAGEL,
F. B. HACKETT

1360-L Street,
Fresno 21, California,

Attorneys for the plaintiffs

FITZWILLIAM & MEMERING,
LEO M. FITZWILLIAM

926-Jay Building,
Sacramento 14, California,

Attorneys for the defendants

In the District Court of the United States, Northern District of California, Northern Division

No. 7007

BARBARA ARRAMONE, a minor, by and through DOMINICK N. ARRAMONE and MARY I. ARRAMONE, her guardians ad litem, DOMINICK N. ARRAMONE and MARY I. ARRAMONE, husband and wife, Plaintiffs,

vs.

JOHN A. PROWSE, as Administrator of the Estate of ALVIN PROWSE, also known as ALVIN I. PROWSE, deceased, FIRST DOE, SECOND DOE and THIRD DOE,

Defendants.

PETITION FOR APPOINTMENT OF GUARDIANS AD LITEM FOR PLAINTIFF TO INSTITUTE ACTION

To the United States District Court for the Northern District of California, Northern Division:

The petition of Barbara Arramone respectfully shows:

That she is an infant under the age of 21 years and of the age, to wit, seventeen (17) years; that she desires to institute an action with this court against John A. Prowse, administrator of the estate of Alvin Prowse, also known as Alvin I. Prowse, deceased, First Doe, Second Doe and Third Doe, above named defendants, to recover the sum of

One Hundred Fifty Thousand Dollars ($150,000.0
in damages for personal injuries; that she has
legally appointed guardian and she therefore pra
that Dominick N. Arramone and Mary J. Arr
mone, her father and mother respectively and wi
whom she resides and has her domicile at 30
North Rutherford Avenue, Chicago, Illinois, m
be appointed guardians ad litem for the purpo
of instituting the action, they having consent
to act.

Dated: This 2nd day of January, 1953.

/s/ BARBARA ARRAMONE,
Petitioner
STUTSMAN, HACKETT & NAGE
/s/ By J. J. NAGEL,
Attorneys for Petitioner

CONSENT

We, Dominick N. Arramone and Mary J. Arr
mone, in the above petition named consent and
and each of us are willing to serve as the guardia
ad litem of the above named petitioner, Barba
Arramone, for the purpose of instituting acti
against the said John A. Prowse, administrator
the estate of Alvin Prowse, also known as Alvin
Prowse, deceased, First Doe, Second Doe and Thi
Doe.

/s/ DOMINICK NICHOLAS ARRAMONE
/s/ MARY J. ARRAMONE

[Endorsed]: Filed Jan. 14, 1954.

[Title of District Court and Cause.]

ORDER APPOINTING GUARDIANS AD LITEM FOR INFANT PLAINTIFF TO INSTITUTE ACTION

Now on this day the petition of the above named Barbara Arramone for the appointment of Dominick N. Arramone and Mary I. Arramone, as her guardians ad litem for the purpose of instituting suit against John A. Prowse, as administrator of the estate of Alvin Prowse, also known as Alvin I. Prowse, deceased, First Doe, Second Doe and Third Doe, above named defendants, and the written consent of Dominick N. Arramone and Mary I. Arramone being presented to the Court and approved, Dominick N. Arramone and Mary I. Arramone are hereby appointed as guardians ad litem to institute and prosecute the action.

Dated: This 14th day of January, 1954.

/s/ DAL M. LEMMON,
District Judge

[Endorsed]: Filed Jan. 14, 1954.

[Title of District Court and Cause.]

COMPLAINT FOR NEGLIGENCE AND DAMAGES

For a first cause of action plaintiff, Barbara Arramone, a minor, by her guardians ad litem, Dominick, N. Arramone and Mary I. Arramone, alleges:

I.

That each of the plaintiffs, Barbara Arramone Dominick N. Arramone and Mary I. Arramone, i a citizen of the State of Illinois and each of th defendants, John A. Prowse, as administrator o the estate of Alvin Prowse, also known as Alvin I Prowse, deceased, First Doe, Second Doe, an Third Doe, is a citizen of the State of California, o is incorporated under the laws of the State of Cali fornia; that each of the counts or matters in con troversy exceeds, exclusive of interest and costs the sum of Three Thousand Dollars ($3,000.00)

II.

That the true names and capacities whethe individual, corporate, partnership, association o otherwise of the defendants sued herein by th fictitious names of First Doe, Second Doe and Thir Doe are unknown to plaintiff and plaintiff there fore sues such defendants by such fictitious name and will ask leave to amend this complaint to show their true names and capacities when same hav been ascertained together with proper charging al legations.

III.

That the plaintiff, Barbara Arramone, is an in fant of the age of (17) seventeen years; that Dom inick N. Arramone and Mary I. Arramone are hus band and wife and the parents of said plaintiff Barbara Arramone, and were legally appointed guardians ad litem of said minor, Barbara Arra mone, by the above entitled court on the 14th day

of January, 1954, for the purpose of prosecuting this action in her behalf.

IV.

That the defendant, John A. Prowse, was appointed administrator of the estate of Alvin Prowse, also known as Alvin I. Prowse, deceased, on the 15th day of October, 1953, pursuant to the order of the Superior Court of the State of California in and for the County of Calaveras in estate proceeding No. 2639 and at all times since has been and now is the duly qualified and acting administrator of the estate of Alvin Prowse, also known as Alvin I. Prowse, deceased.

V.

That on or about the 27th day of August, 1953, while the plaintiff, Barbara Arramone, was riding as a passenger in a certain automobile being driven by Joseph R. Brunkala at the intersection of U.S. Highway 99 at California State Route 88 also known as Waterloo Road, public highways in the County of San Joaquin, State of California, the said Alvin Prowse, also known as Alvin I. Prowse, deceased, did so negligently drive and operate a certain 1950 Dodge pickup truck owned and controlled by him as to cause it to violently collide with the automobile in which said plaintiff, Barbara Arramone, was riding.

VI.

That as a result of the negligence of the said Alvin Prowse, also known as Alvin I. Prowse, de-

ceased, and the aforesaid collision said plaintiff Barbara Arramone, was thrown in and about the automobile in which she was riding and sustained injuries as follows, to wit: Loss of four teeth, dam age to five other teeth of which four may be los concussion of the brain, severe multiple laceration of the forehead and face, injury and possible pe manent paralysis to facial nerves in the left chee abrasion and loss of skin covering on nose, lacer tion of the left knee, chip fracture of the distal po tion of the ulna of the left arm, secondary anem and shock and injury to brain and nervous syster that plaintiff is informed and believes that sa injuries and each of them are of a permanent n ture; that plaintiff, Barbara Arramone has therel been damaged in the sum of One Hundred Fif Thousand Dollars ($150,000.00).

VII.

That heretofore and on or about the 22nd day January, 1954, a verified claim was filed on beha of the plaintiff, Barbara Arramone, by her gua dians ad litem, Dominick N. Arramone and Mar I. Arramone, with the Clerk of the Superior Cou of the State of California in and for the Coun of Calaveras in that certain probate proceedi entitled, "In the Matter of the Estate of Alv Prowse, also known as Alvin I. Prowse, deceased proceeding No. 2639; that thereafter and on about the 1st day of February, 1954, the said d fendant, John Prowse, as administrator of th estate of Alvin Prowse, also known as Alvin

Prowse, deceased, filed a rejection of plaintiff's claim in aforesaid estate proceedings.

VIII.

That plaintiff's claim herein sued upon is one that survives the death of a tort feasor under the law of the State of California.

For a Second, Separate and Distinct Cause of Action Plaintiffs, Dominick N. Arramone and Mary L. Arramone, allege:

I.

That plaintiffs by reference incorporate paragraphs I, II, III, IV, V and VI of the First Cause of Action of plaintiff, Barbara Arramone, as though again fully set forth herein.

II.

That as a result of the negligence of the said Alvin Prowse, also known as Alvin I. Prowse, deceased, and the collision and injuries sustained by the plaintiff, Barbara Arramone, as aforesaid it has been necessary for these plaintiffs to expend to date the sum of Five Hundred Twenty-Five Dollars ($525.00) for doctor's services, hospital services, dental services, ambulance, drugs, X-rays and allied expenses; that your affiants are informed and believe and therefore allege that it will be necessary for them to expend in the future further sums as and for medical services, hospital services, dental services, X-rays, drugs and other allied expenses to be rendered to the said Barbara Arramone in

the amount of Fourteen Thousand Four Hundr
Seventy-Five Dollars ($14,475.00); that these pla
tiffs will thereby be damaged in the total sum
Fifteen Thousand Dollars ($15,000.00).

III.

That heretofore and on or about the 22nd day
January, 1954, a verified claim was filed by t
plaintiffs, Dominick N. Arramone and Mary I. A
ramone, with the Clerk of the Superior Court
the State of California, in and for the County
Calaveras in that certain probate proceeding
titled, "In the Matter of the Estate of Alv
Prowse, also known as Alvin I. Prowse, decease
proceeding No. 2639; that thereafter and on
about the 1st day of February, 1954, the said
fendant, John Prowse, as administrator of t
estate of Alvin Prowse, also known as Alvin
Prowse, deceased, filed a rejection of plaintif
claim in aforesaid estate proceedings.

IV.

That plaintiffs' claim herein sued upon is o
that survives the death of a tort feasor under t
law of the State of California.

Wherefore, plaintiffs demand judgment agai
the defendants and each of them as follows:

1. That plaintiff, Barbara Arramone, have jud
ment in the sum of One Hundred Fifty Thousa
Dollars ($150,000.00) on the first cause of action.

2. That plaintiffs, Dominick N. Arramone a

Mary I. Arramone, have judgment in the sum of Fifteen Thousand Dollars ($15,000.00) on the second cause of action.

3. That plaintiffs have their costs of suit.

/s/ DOMINICK N. ARRAMONE,
/s/ MARY I. ARRAMONE,
Plaintiffs

STUTSMAN, HACKETT & NAGEL
/s/ By J. J. NAGEL,
Attorneys for Plaintiffs

[Endorsed]: Filed March 17, 1954.

[Title of District Court and Cause.]

ANSWER

Comes now defendant John A. Prowse, as administrator of the estate of Alvin Prowse, also known as Alvin I. Prowse, deceased, and answering plaintiffs' complaint on file herein, admits, denies and alleges:

Answering the First Cause of Action:

I.

Admits the allegations contained in paragraphs IV and VII and answering Paragraph I, further admits that he is a citizen of the State of California, but concerning the remaining allegations in paragraph I contained, this answering defendant alleges that he does not have sufficient information

or belief upon or concerning said remaining all gations to enable him to answer said remainin allegations and for that reason and upon th ground denies each and all and every said remai ing allegations.

II.

Answering paragraphs II, III, V, VI and VII this answering defendant alleges that he does n have sufficient information or belief upon or co cerning the allegations in said paragraphs co tained to enable him to answer said allegations a for that reason and upon that ground, denies ea and all and every the allegations contained in sa paragraphs and denies that plaintiffs or any them were damaged in any sum whatsoever.

Answering the Second Cause of Action:

I.

Answering paragraph I, repeats and realleg each and all and every the allegations in answer those allegations set forth in plaintiffs' first cau of action hereby referring to same and by su reference making the same a part hereof with t same force and effect as if the same were here pleaded in detail.

II.

Admits the allegations contained in paragra III.

III.

Answering paragraphs II and IV, this answeri defendant alleges that he does not have sufficie information or belief upon or concerning the all

gations in said paragraphs contained to enable him to answer said allegations and for that reason and upon that ground denies each and all and every the allegations contained in said paragraphs and denies that the plaintiffs or any of them have been damaged in any sum whatsoever.

Wherefore, this answering defendant prays that plaintiffs take nothing by their complaint and that this answering defendant be hence dismissed with his costs herein incurred.

McDOUGALL & FITZWILLIAM,
/s/ By LEO M. FITZWILLIAM,
Attorneys for said Defendant

Affidavit of Service by Mail attached.
Duly Verified.

[Endorsed]: Filed April 27, 1954.

[Title of District Court and Cause.]

VERDICT FOR PLAINTIFF

We, the Jury, find in favor of the Plaintiff, Barbara Arramone, and assess the damages against the Defendant in the sum of Six Thousand ($6,000.00) Dollars.

/s/ HAROLD GARFIELD,
Foreman

[Endorsed]: Filed April 8, 1955.

[Title of District Court and Cause.]

VERDICT FOR PLAINTIFF

We, the Jury, find in favor of the Plaintiff Dominick N. Arramone and Mary I. Arramon and assess the damages against the Defendant i the sum of Four Thousand ($4,000.00) Dollars.

/s/ HAROLD GARFIELD,
Foreman

[Endorsed]: Filed April 8, 1955.

[Title of District Court and Cause.]

JUDGMENT ON VERDICT

This cause having come on regularly for trial o April 4th, 1955, before the Court and a Jury c twelve persons duly impaneled and sworn to try th issues joined herein; Gerald W. Stutsman, Esq and J. J. Nagel, Esq., appearing as attorneys fo the plaintiffs, and Leo M. Fitzwilliam, Esq., appea ing as attorney for the defendants, and the tria having been proceeded with on the 5th, 6th, 7th and 8th days of April in said year, and oral an documentary evidence on behalf of the respectiv parties having been introduced and closed, and th cause, after arguments by the attorneys and th instructions of the Court, having been submitted t the Jury, and the Jury having subsequently ren dered the following verdicts, which were ordere recorded, viz:

"We, the Jury, find in favor of the Plaintiff Barbara Arramone and assess the damages against the Defendant in the sum of Six Thousand ($6,000) Dollars.

Harold Garfield, Foreman."

"We, the Jury, find in favor of the plaintiffs Dominick N. Arramone and Mary I. Arramone and assess the damages against the Defendant in the sum of Four Thousand ($4,000.00) Dollars.

Harold Garfield, Foreman."

and the Court having ordered that judgment be entered herein in accordance with said verdicts and for costs;

Now, therefore, by virtue of the law and by reason of the premises aforesaid, it is considered by the Court that said plaintiffs do have and recover of and from said defendants the sum of Ten Thousand ($10,000.00) Dollars, together with their costs herein expended taxed at $304.99.

Dated: April 13th, 1955.

C. W. CALBREATH,
Clerk

/s/ By C. C. EVENSEN,
Deputy Clerk

[Endorsed]: Filed and Entered April 13, 1955.

[Title of District Court and Cause.]

NOTICE OF MOTION FOR NEW TRIAL

To John A. Prowse, as administrator of the estat of Alvin Prowse, also known as Alvin Prowse, deceased, and to his attorneys, Fitzwilliam & Memering:

You, and each of you, will please take notice tha on Monday, the 23rd day of May, 1955, at th courtroom of the United States District Court fo the Northern District of California, Northern Div sion, in the Post Office Building, in the City o Sacramento, County of Sacramento, State of Cal fornia, at the hour of 10:00 o'clock a.m., plaintiff will move the court to set aside the verdict an grant to plaintiffs a new trial on the followin grounds:

1. That the verdict was against the weight o the evidence.

2. That inadequate damages were awarded t plaintiff, Barbara Arramone, a minor, by an through Dominick N. Arramone and Mary I. Arra mone, her guardians ad litem.

Said motion will be based upon this notice, upo all of the files, papers, pleadings and proceeding herein, upon the minutes of the court, and affidavit to be filed.

Dated this 14th day of April, 1955.

STUTSMAN, HACKETT & NAGE

/s/ By J. J. NAGEL,

Attorneys for Plaintiffs

Affidavit of Service by Mail attached.

[Endorsed]: Filed April 16, 1955.

In the United States District Court for the Northern District of California, Northern Division

Civil No. 7007

BARBARA ARRAMONE, a minor, etc., et al., Plaintiffs,

vs.

JOHN A. PROWSE, etc., et al., Defendants.

ORDER DENYING PLAINTIFFS' MOTION FOR A NEW TRIAL

The matter of plaintiffs' motion for a new trial in the above entitled action came on regularly for hearing on the 23rd day of May, 1955. All parties appeared through their respective counsel, the matter was argued, and thereafter it was submitted to the Court for its decision and determination. The Court having considered said motion and the authorities applicable thereto and good cause appearing therefor:

It is hereby ordered, adjudged and decreed that plaintiffs' motion to set aside the verdict of the jury and grant plaintiffs a new trial in the above entitled action be, and the same is hereby denied.

Dated: July 12, 1955.

/s/ SHERRILL HALBERT,
United States District Judge

[Endorsed]: Filed July 12, 1955.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that Barbara Arramon a minor, by and through her guardians ad liter Dominick N. Arramone and Mary I. Arramone, or of the above named plaintiffs, hereby appeals to th United States Court of Appeals for the Ninth Ci cuit from the Order Denying plaintiff's Motion fo a New Trial entered in this action on the 12th da of July, 1955.

STUTSMAN, HACKETT & NAGE

/s/ By J. J. NAGEL,
Attorneys for Appellant Barbara Arramone

[Endorsed]: Filed Aug. 10, 1955.

[Title of District Court and Cause.]

BOND FOR COSTS ON APPEAL

We, the undersigned, jointly and severally a knowledge that we, the undersigned and our pe sonal representatives or corporate successors, ar bound to pay to John A. Prowse, as administrato of the Estate of Alvin Prowse, also known as Alvi I. Prowse, deceased, the sum of Two Hundred an Fifty Dollars ($250.00).

The condition of this bond is that, whereas th plaintiff Barbara Arramone has appealed to th Court of Appeals for the Ninth Circuit by notic

f appeal filed Aug. 9, 1955 from the Order of this Court entered July 12, 1955, denying Plaintiff's Motion for a New Trial, if the plaintiff shall pay ll costs adjudged against her if the appeal is dis-nissed or the order affirmed or such costs as the ppellate Court may award if the order be reversed, hen this bond to be void, but if the plaintiff fails o perform this condition, payment of the amount f this bond shall be due forthwith.

BARBARA ARRAMONE,
Plaintiff

/s/ By J. J. NAGEL,
One of the Attorneys for the
Plaintiff, Barbara Arramone

Seal] /s/ J. J. NAGEL,
Surety, One of the Attorneys for the
Plaintiff, Barbara Arramone

Seal] HARTFORD ACCIDENT AND
INDEMNITY COMPANY,

/s/ By R. W. RICHTER,
Surety, Attorney-in-Fact.

Notary Public's Certificates attached.

[Endorsed]: Filed Aug. 10, 1955.

Title of District Court and Cause.]

DESIGNATION OF CONTENTS OF RECORD ON APPEAL

Pursuant to rule 75 (a) of the Federal Rules of Civil Procedure, the Plaintiff, Appellant Barbara

Arramone, a minor by and through her Guardia
ad Litem Dominick N. Arramone and Mary I. A
ramone hereby designates for inclusion in the re
ord of appeal to the United States Court of Appea
for the Ninth Circuit taken by notice of appe
filed August 9, 1955, the following portions of t
record, proceedings and evidence in this action:

1. Petition of Barbara Arramone, for appoi
ment of Guardians ad Litem, for Plaintiff to ins
tute action.

2. Order Appointing Guardians ad Litem, f
Infant Plaintiff to institute action.

3. The Complaint.

4. The Answer.

5. The entire transcript of the testimony of t
plaintiff Barbara Arramone, and the entire transcri
of the testimony of Mary I. Arramone, witness a
one of the Guardians ad Litem of the Plaintiff Ba
bara Arramone, the entire portion of the testimo
of the witness Walter Bromberg, M.D., the enti
testimony of the witness Wesley Evans, M.D., pe
taining to plaintiff Barbara Arramone, the enti
portion of the testimony, by way of deposition,
the witness Paul W. Greeley, M.D., the entire po
tion of the testimony, by way of deposition, of t
witness Warren R. Johnson, D.D.S., the entire po
tion of the testimony, by way of deposition, of t
witness Charles J. Smalley, M.D., relating to t
plaintiff Barbara Arramone, and the entire porti
of the testimony of the witness, H. V. Petzold, M.

6. All photographic exhibits relating to the i
juries of the plaintiff, Appellant Barbara Arr

mone, being plaintiff's exhibits Nos. 21, 22, 23, 24 and 25, and the hospital records relating to Barbara Arramone, being plaintiff's exhibit No. 11.

7. Verdict of the Jury in favor of the Plaintiff, Barbara Arramone.

8. Judgment in favor of the plaintiff Barbara Arramone.

9. Notice of Motion of new trial entered in behalf of Barbara Arramone, Plaintiff and Appellant.

10. Order Denying Plaintiff's Motion for New Trial.

11. Notice of Appeal.

12. Statement of Points on Appeal.

13. This Document.

14. Journal Entries.

STUTSMAN, HACKETT & NAGEL

/s/ By J. J. NAGEL,

Attorneys for plaintiff, appellant Barbara Arramone

Affidavit of Service by Mail attached.

[Endorsed]: Filed Sept. 12, 1955.

[Title of District Court and Cause.]

STATEMENT OF POINTS ON APPEAL

Pursuant to rule 75 (d) of the Federal Rules of Civil Procedure, the Plaintiff-Appellant Barbara Arramone, a minor, by and through her Guardians ad Litem, Dominick N. Arramone and Mary I. Arramone, presents the points upon which appellant will rely on appeal.

1. That the damages awarded Plaintiff-Appellant Barbara Arramone by the jury are inadequate

2. That the Court erred in refusing to grant a new trial on the ground that the damages awarded plaintiff-appellant Barbara Arramone were inadequate as a matter of law.

STUTSMAN, HACKETT & NAGEL

/s/ By J. J. NAGEL,
Attorneys for Plaintiff-Appellant
Barbara Arramone

[Endorsed]: Filed Sept. 12, 1955.

[Title of District Court and Cause.]

ORDER EXTENDING TIME TO DOCKET APPEAL

It is hereby ordered that the time within which to docket the appeal herein in the United States Court of Appeals for the Ninth Circuit be and the same is hereby extended to and including the 19th day of October, 1955.

Dated: September 17th, 1955.

/s/ SHERRILL HALBERT,
United States District Judge

[Endorsed]: Filed Sept. 17, 1955.

Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, C. W. Calbreath, Clerk of the District Court f the United States for the Northern District of alifornia, do hereby certify that the foregoing and ccompanying documents listed below, are the origi- als filed in this court, in the above entitled case, nd that they constitute the record on appeal herein s designated by the plaintiffs herein.

Petition for appointment of guardian ad litem.
Order appointing guardians ad litem.
Complaint.
Answer.
Verdict (in favor of Barbara Arramone).
Verdict (in favor of Dominick N. Arramone).
Judgment on verdicts.
Notice of motion for a new trial.
Order denying plaintiffs' motion for a new trial.
Notice of appeal.
Bond for costs on appeal.
Designation of contents of record on appeal.
Statement of points on appeal.
Order extending time to docket appeal.
Plaintiff's exhibits 11, 21, 22, 23, 24 and 25.

In witness whereof, I have hereunto set my hand nd the seal of said Court this 18th day of October, 955.

Seal] C. C. CALBREATH,
Clerk
/s/ By C. C. EVENSEN,
Deputy Clerk

[Title of District Court and Cause.]

SUPPLEMENTAL CERTIFICATE OF CLERK

I, C. W. Calbreath, Clerk of the District of the United States for the Northern District of California, do hereby certify that the accompanying Reporter's Transcript is the original filed in this case, in this Court and constitutes the Supplemental Record on Appeal.

Dated: December 7th, 1955.

[Seal] C. W. CALBREATH,
Clerk
/s/ By C. C. EVENSEN,
Deputy Clerk.

In the United States District Court in the Northern District of California, Northern Division

No. 7007

BARBARA ARRAMONE, a minor, etc., et al.,
Plaintiffs,

vs.

JOHN A. PROWSE, as administrator, etc., et al,
Defendants.

TRANSCRIPT OF PROCEEDINGS

April 5, 6 and 7, 1955

Before Hon. Sherrill Halbert, Judge.

Appearances: For the Plaintiffs: Stutsman, Hackett & Nagel, by Gerald W. Stutsman, Esq., and J. J

agel, Esq., 1360 L Street, Fresno, 21, California.
or the Defendants: Fitzwilliam & Memering, by
o M. Fitzwilliam, Esq., 926 J Street Building,
cramento, California. [1*]

DR. WESLEY H. EVANS

lled as a witness on behalf of the Plaintiffs,
orn.

Direct Examination

y Mr. Stutsman:

Q. Doctor Evans, what is your full name?

A. Wesley Henry Evans.

Q. Where do you reside?

A. In Stockton, California.

Q. And are you a duly licensed and practicing
ysician and surgeon in the State of California?

A. Yes, I am.

Q. And where is your office located, Doctor?

A. At the San Joaquin General Hospital in
ockton.

Q. Doctor, would you please relate the schools
ou attended and the training you had prior to
coming a doctor of medicine?

A. I attended medical school at the University
Utah at Salt Lake City, Utah, and then interned
the San Joaquin General Hospital in Stockton,
nd then I proceeded to go into a surgical residency
the San Joaquin General Hospital.

Q. After you interned at the San Joaquin Gen-

* Page numbers appearing at top of page of original Reporter's
anscript of Record.

(Testimony of Dr. Wesley H. Evans.)

eral Hospital you obtained your license as a ph sician and surgeon, is that right? [2]

A. Yes,—I actually received it before I cor pleted my internship.

Q. And then you stayed for special training surgery? A. Yes, I did.

Q. Are you a resident of that hospital at t present time? A. Yes, I am.

Q. And were you on August 27, 1953?

A. Yes, I was.

Q. Doctor, do you specialize in any branch medicine? A. In general surgery.

Q. And to what medical societies do you belon

A. I am a Junior member of the San Joaqu County Medical Society.

Q. And you practice in this hospital, that is t hospital where you do your practicing?

A. Yes.

Q. Now, in the practice of your profession d you have occasion to examine and treat Barba Arramone? A. Yes, I did.

Q. And where did you first see her, Doctor?

A. I saw her on the surgical ward at the Sa Joaquin General Hospital?

Q. And on what date was that?

A. That was on August 28, 1953.

Q. At what time of day?

A. It was approximately nine o'clock a.m. [3]

Q. Now, did you obtain a history relative to h condition at that time?

(Testimony of Dr. Wesley H. Evans.)

A. I went over the records in her chart which d been made up prior to that.

Q. And would you relate, doctor, what history u obtained relative to her condition at that time?

A. She had been admitted to the hospital the ternoon before and that evening had been taken surgery where multiple lacerations had been re-ired. At the time I saw her she was conscious d I did take a very superficial examination of r.

Q. A physical examination?

A. That is right.

Q. And, doctor, will you relate to us your find-gs of this examination made of her?

A. At the time I saw her she had these multiple cerations of her face. The most severe laceration as one which extended from the corner of her outh up to the left side of her face to a point out two inches below the eye. There was also vere lacerations of the lower lip, which extended om the chin up through the lip just to the left the midline.

She also had a sort of an evulsion injury of the idge of the nose and minor lacerations of the elids on both sides.

She also had one minor laceration of the right eek. [4]

Q. Did you examine her teeth, Doctor?

A. Not conclusively, just very superficial.

Q. What did your superficial examination re-al as to the condition of her teeth?

(Testimony of Dr. Wesley H. Evans.)

A. Referring to the records, the note was ma
that there were two teeth missing that had be
knocked out and there was one that had be
chipped.

Q. Doctor, when you saw her she had alrea
been in surgery, you testified?

A. That is right.

Q. And she undergone——

Mr. Fitzwilliam: Pardon me, I don't like
interrupt, but I am not sure that I heard that.

Mr. Stutsman: She had already undergone su
gery.

Mr. Fitzwilliam: Oh, I am sorry, I didn't he
that.

Mr. Stutsman: In other words, doctor, she h
multiple sutures, is that right?

A. Yes, that is right.

Q. Where there any other findings relative
any physical condition that you noted at that tim

A. She also had a superficial laceration of t
left knee, which had also been sutured, and al
had some superficial abrasions and contusions abo
the chest.

Q. Doctor, at that time did you have any opi
ion as to whether she was uncomfortable or
pain? Could you make any determination [5]
any finding in that regard?

A. She had been receiving some hypos. The
was some pain.

Q. Now, doctor, coming back to the more serio

(Testimony of Dr. Wesley H. Evans.)

acerations you noted, from the corner of the mouth
o about two inches below the ear, you stated?

A. Two inches below and about an inch lateral
o the corner of the eye.

Q. How long was that laceration?

A. Approximately four to four and a half inches.

Q. And relative to the cheek, how deep was that,
Doctor?

A. Referring again to the note, it was noted
hat the laceration was completely through the
heek at the lower end of the laceration.

Q. Now, in repairing that, how is that repaired
urgically, Doctor?

A. Again referring to the operative note, which
as made by another doctor, the membrane inside
he mouth was sutured separately and then there
ere sutures placed in the muscle and the skin
as closed with a subcutaneous wire.

Q. Now, Doctor, you examined and saw the area
f the cut in the face, did you not?

A. Yes, I did.

Q. In that particular laceration, in your opin-
on did that laceration sever nerves in the face?

A. Yes, it would. There would be a branch of
he 7th nerve which would have to sever. [6]

Q. And also were the muscles severed in that
rea?

A. Yes, there was some muscles severed. They
ould have to be.

Q. Did your findings reveal that, Doctor?

(Testimony of Dr. Wesley H. Evans.)

A. At the time I saw her she did have a weakness of the left side of the face, yes.

Q. And relative to the one in the lower lip down to the chin, will you describe that and how that was repaired?

A. That laceration also was completely through the lip. It was repaired by approximating the membrane on the inside with separate catgut sutures and the muscles were approximated with catgut sutures, and the skin was approximated with silk satures.

Q. Now, relative to the bridge of the nose, you say there was evulsion of the flesh, or how was that?

A. Yes, there was an evulsion of skin. In other words, a loss of skin in that area.

Q. How deep was that, doctor?

A. Just through the skin.

Q. Through the skin, you mean the dermis, is that medically what you call it?

A. Dermis and epidermis, yes.

Q. Were both those layers gone?

A. Over a small area, yes.

Q. How does nature heal an injury like that Doctor? [7]

A. It does it by scarring. It has to send in fibrous tissue to cover the area.

Q. Was any repairing done of that in the hospital? A. No, there wasn't.

Q. How about the other lacerations, were there any other surgical repairs on those?

(Testimony of Dr. Wesley H. Evans.)

A. Yes, the other lacerations were simply closed with silk sutures.

Q. Do you have any notes as to how many sutures the various lacerations required?

A. No, not the exact number.

Q. Do you have any estimate of the number? Were they extensive or——

A. The lacerations above the eyes, one was approximately 1½ inches, the other approximately 1 inch, and I think the laceration of the right cheek was approximately 1½ to 2 inches.

Q. And do you know the depth of those lacerations, Doctor?

A. They were described on the chart as being superficial. In other words, just through the skin.

Q. Doctor, you might say that Barbara Arranone was brought to your hospital more as an emergency case, is that right, Doctor?

A. Yes, sir, that is right.

Q. And how long was she in your hospital?

A. She was admitted on August 28th and discharged on— [8] let's see—September 23rd—correction: She was admitted August 27th and dismissed on September 3.

Q. Do you know where she went when she left the hospital?

A. She left by ambulance. I understood she was going to Fresno to a private doctor's care in Fresno.

Q. Now, did your treatment and care go beyond the emergency treatment, Doctor?

A. Not on this particular case.

(Testimony of Dr. Wesley H. Evans.)

Q. And you took no corrective surgery like pla tic surgery, or anything like that?

A. No, we did not.

Q. What was her general condition, docto when she left for Fresno in the ambulance?

A. It was satisfactory for transfer.

Q. Did you make any study or investigation t determine whether there was any brain damage b electro-cardiographs or anything like that, Doctor

A. No; we did a superficial or gross neurolog cal examination, that is all.

Q. What did that reveal, Doctor?

A. The neurological examination we did wa negative.

Q. Relative to the effect of the cutting of th nerve of the face, did you have any findings in tha regard?

A. There was a weakness, as I previously men tioned, of the left side of the face, indicating tha that branch of the [9] seventh nerve had bee severed.

Q. You haven't seen her since she left the hos pital September 2nd?

A. Not until today, sir.

Q. And you have no knowledge as to the cours of her condition or her present condition?

A. No, I haven't.

Mr. Stutsman: Thank you, Doctor. That is a I have. Do you have any questions?

Oh, if the Court please, may I ask one mor question?

Testimony of Dr. Wesley H. Evans.)

Mr. Fitzwilliam: Certainly.

Mr. Stutsman: Q. Doctor, do you have the hospital records of the San Joaquin General Hospital?

A. Yes, I do.

Q. And are those kept under your direction here as resident surgeon? A. Yes, they are.

Q. And in fact some of those entries were made made by you? A. Some of them are, yes.

Mr. Stutsman: If the Court please, we would like to introduce Barbara Arramone's hospital records at this time, and, counsel, may photostatic copies be later substituted for the originals?

Mr. Fitzwilliam: I have no objection.

The Court: Let these documents be received and marked [10] Plaintiff's Exhibit 11 for the Plaintiff Barbara Arramone—well, I assume that that also is applicable to Mr. and Mrs. Arramone, who are plaintiffs in that action?

Mr. Stutsman: Yes.

The Court: They will be marked Plaintiffs' Exhibit 11 for the Arramones.

Mr. Stutsman: Yes, your Honor.

(The hospital records referred to were marked Plaintiffs' Exhibit No. 11 for the Arramones, and received in evidence.)

The Court: It does not concern the Brunkala case.

Mr. Stutsman: Yes, your Honor.

Q. Doctor, just one point for clarification: Now which knee was that that you found was injured?

A. The left knee.

(Testimony of Dr. Wesley H. Evans.)

Mr. Stutsman: Thank you.

(Examination by Mr. Pacht omitted fr this transcript.)

Cross Examination

By Mr. Fitzwilliam:

Mr. Fitzwilliam: If your Honor please I wou like to have just a moment to look these recor over here. I have never seen them before.

The Court: All right.

Q. Doctor, maybe you could help me. Do the read backwards here?

A. Yes, they do. They start at the back. The are the [11] nurses' notes.

Q. Oh, I see. Oh, all right. Fine, thank you.

Doctor, were there any X-rays taken of M Arramone? A. No, there wasn't.

Q. All right. Was there any complaint at a time about the right wrist?

A. Not that I could recall, no.

Q. And just so I am sure, is it the right wr that was——

The Court: Mr. Fitzwilliam, I can't hear y and I am sure the reporter can't.

Mr. Fitzwilliam: Oh, I am sorry, I was ju asking counsel?

Q. Was there any complaint about the l wrist, Doctor?

A. Not that I can recall.

Q. Now when these lacerations were sutured was done under sedation, wasn't it?

estimony of Dr. Wesley H. Evans.)

A. Yes, it was, apparently, according to the rec-
ds. I wasn't there at the time.

Q. That was in an effort to relieve the patient's
comfort? A. Yes.

Q. All right. And then by the 30th, I notice
re, August 30th, the statement is made, "Ate
ll, right; cheerful and cooperative," is that right?

A. Yes.

Q. That would indicate to you, "cheerful and
operative," [12] and so forth, that at that time
e patient apparently was resting comfortably,
uldn't it?

A. Fairly well; that she was progressing satis-
torily, yes.

Q. And then here, "discharged"—what date is
s, Doctor, September 2nd?

A. That would be September 2nd.

Q. All right. "Patient offers no complaint, read-
g most of the time, visitors." As a doctor that
uld indicate to you that on September 2nd Bar-
ra Arramone apparently was relaxed, wouldn't
and quite comfortable?

A. Yes, she was quite comfortable.

Q. Yes, all right. And I think you have de-
ribed as superficial the lacerations that existed,
clusive of the one of the left cheek and the chin,
d the nose, that is what you call evulsion?

A. That is correct.

Q. All right. And you say that was an evulsion
the skin, and I think you made some statement
at nature does something to that?

(Testimony of Dr. Wesley H. Evans.)

A. Yes, to the healing, it tends to heel it scarring, and also the epithelium of the skin ter to close over.

Q. And I presume, Doctor, that at the time s left the hospital six days or perhaps seven da later that healing of these lacerations was in go progress? A. Yes, it was. [13]

Q. Now the laceration of the knee you have scribed as superficial, which means on the surfa doesn't it, more or less?

A. I mean by superficial a laceration which co pletely goes through the skin but does not invo deep structures, such as muscles and nerves and forth.

Q. All right. And from your observation of th from the stitching that was done there, it appea to be well closed and was healed? At least well the progress of healing when she left the hospit

A. Yes, at the time.

Q. All right. And you saw no reason to be co cerned about any involvement of any bones?

A. No, I did not.

Q. And there were no complaints or no sym toms that indicated to you the necessity of a X-rays, or any possible bone pathology?

A. None at that time, no.

Q. All right. Now you told us that you made superficial neurological examination, is that c rect? A. That is correct.

Q. All right. And that you were of the opini that there had been a damage or perhaps a sev

(Testimony of Dr. Wesley H. Evans.)

nce of the seventh nerve on the left side of the face? A. Of a branch of the seventh nerve.

Q. Of a branch?

A. Yes, that is right.

Q. All right. Now this neurological examination s done by making certain tests to determine the ctivity of the nervous system—I put that rather adly—but is it something along those lines?

A. Yes, that is right.

Q. All right. And there weren't any complaints, vere there, Doctor, that led you to believe that here had been any particular brain damage as far s Barbara Arramone was concerned?

A. No, there had not.

Q. In other words, the records and her history here, especially in the last few days, would denote he absence of any headaches or any sever headaches? A. Would you state that, again.

Q. I say the hospital record as it relates to her condition for the last few days there denotes the absence, doesn't it, of headaches?

A. Yes, I think it does.

Q. All right. So you had no concern in dismissng her some week later that there was any particular brain damage?

A. No, not at that time. I thought she was in good enough condition to be transferred.

Q. And when we talk about cerebral concussions, as to any [15] of the plaintiffs or anybody, they are diagnosed, aren't they, simply from a history of unconsciousness?

(Testimony of Dr. Wesley H. Evans.)

A. More from a history than from actual find ings, yes.

Q. Well, every time a prizefighter gets knocke out he has a cerebral concussion, doesn't he?

A. Yes, to a certain degree.

Q. So that is the basis of a diagnosis, then, o concussion, isn't it? A. Yes, it is.

Q. It is a history of a period of unconscious ness. Were the sutures removed before she left th hospital? A. Yes, they were.

Q. They were all taken out by that time, an so we don't have any mistake on that, sutures an stitches are the same thing, right?

A. That is right.

Q. All right. Now, as far as Mrs. Brunkala i concerned—if I may have just one minute again your Honor, I have no purpose of trying to kee the doctor over, and I assure you I won't pro long it.

(Cross examination relating to other plain tiffs omitted from this transcript.)

Redirect Examination

By Mr. Stutsman:

Q. Doctor, relative to these, what you call super ficial [17] lacerations, I believe you said you cal them superficial because it doesn't go into the dee structures, is that right? A. That is right.

Q. And in between the dermis and epidermi before you get to the deep structures like muscle or nerves is a layer of fat?

(Testimony of Dr. Wesley H. Evans.)

A. Yes, what you call subcutaneous tissue.

Q. So the lacerations could go to that area and still not be into the deep structures, is that right?

A. That is right.

Q. Doctor, relative to the cosmetic deformity on the face lacerated, the scar forms in the epidermis and subcutaneous tissues, is that right?

A. That is right.

Mr. Fitzwilliam: Your Honor, I don't like to interrupt, but these questions are extremely leading.

Mr. Stutsman: I was doing that because the scientific——

Mr. Fitzwilliam: Very well.

The Court: I think they are leading.

Mr. Stutsman: Very well.

Q. Doctor, where does the scarring area grow on a laceration of the face, what part of the tissue?

A. It occurs actually in all layers that are injured.

Q. And what can we see when we look at them?

A. Well, we see the external or epidermis portion of the scar.

Q. And can we see the scarring of the deep structures by looking at them externally?

A. Occasionally, if the scar is thick enough it tends to raise the area, and sometimes we can see it.

Q. Doctor, relative to a neurological examination would there be any difficulty in giving a neurological examination in the condition of Barbara Arramone, at the time she was in the hospital?

(Testimony of Dr. Wesley H. Evans.)

A. At the time I saw her I don't think the would be.

Q. Did you give any tests for smell, like clov or anything of that nature?

A. Not that detailed neurological examinatio I did not do it.

Q. Will you describe just generally what you gross or superficial neurological examination co sisted of?

A. That is right. We can check the reflexes ar motor sensations and so forth. We didn't go in any detail.

Q. Now doctor, on the notes we have here, the nurses' records which Mr. Fitzwilliam referre to, we have here—we start August 28th, is tha right, is that the first nurse's record.

A. There are a few here under August 27t and that is the 28th. [19]

Q. The 28th. And was there any complaints headaches during this initial period there?

A. No, there is not.

Q. That was on August 28th?

A. That is right.

Q. August 29th?

The Court: Don't those notes show?

The Witness: I guess they would, yes.

The Court: Unless the Doctor has some ind pendent knowledge not appearing there.

A. No, I do not. I would have to refer to th records.

Testimony of Dr. Wesley H. Evans.)

Mr. Stutsman: Q. Doctor, I notice it says "Surcal liquid diet." What does that mean?

A. That would mean that the food given her as entirely liquid.

Q. Was that during all the time she was there?

A. I don't think so. I would have to refer to the ecord.

Q. Now, Doctor, you note the record on August 9th at this point, I will ask you to explain this art here, "Patient complains she was hungry, unble to eat on account of her mouth." What prented her from eating, Doctor, the condition of er mouth?

A. Oh, I think the—especially this one deep ceration of the left cheek would be fairly painful n her attempt to chew. [20]

Q. Would it have any effect upon the function f the muscles?

A. Yes, it would. The lacerations extend into ne musculature which one uses in chewing food.

Q. Doctor, getting to the concussion, Mr. Fitzilliam mentioned about unconsciousness. If a perbn had a blow on the head and then had amnesia or two or three days after the accident would that e classified as a concussion or not?

A. If there were no organic neurological findngs present it would be, yes.

Q. Doctor, I gather from this you made no rognosis regarding her future course, did you?

A. No, I did not.

Mr. Stutsman: Thank you, Doctor.

(Testimony of Dr. Wesley H. Evans.)

(Examination by Mr. Pacht omitted fr this transcript.)

(Recross examination by Mr. Fitzwilliam lating to plaintiff Brunkala omitted from t transcript.) [21]

Wednesday, April 6, 1955

MARY ARRAMONE

one of the Plaintiffs called as a witness in her o behalf, sworn.

Direct Examination

By Mr. Nagel:

Q. Mrs. Arramone, would you give us your f name, please? A. Mary Arramone.

Q. And the name of your husband is what?

A. Dominick Arramone.

Q. And are you Barbara Arramone's mothe

A. Yes, I am.

Q. Do you have any other children other th Barbara? A. Yes, I do.

Q. And how many other children do you hav

A. One other daughter.

Q. And she and your husband are back hon are they? A. How?

Q. She and your husband are home in Chica Illinois? A. Yes.

Q. What is that address in Chicago?

A. 3011 North Rutherford Avenue.

Q. Mrs. Arramone, how old was Barbara August 27, 1953? A. She was 17 years o

(Testimony of Mary Arramone.)

Q. And she is how old today?

A. She is 19 to date.

Q. She was born when?

A. October 20, 1935.

Q. Mrs. Arramone, it has been testified here riefly that Barbara had come to California along ith a girl friend and an uncle and aunt as a part f their vacation, and some time during that vaca- ion while traveling from Fresno back home they ere involved in an automobile collision. Is that rue? A. Yes.

Q. You were at home, were you, along with our husband and the rest of your family and Bar- ara was involved in the collision?

A. Yes, I was.

Q. And then did you see Barbara some time fter she was involved in this collision?

A. I seen her ten days after.

Q. And at that time had she been transported rom the San Joaquin General Hospital in Stock- on by ambulance to Fresno?

A. Yes, she was.

Q. And at the time you saw her some ten days fter she was involved in this collision she was in hat hospital in Fresno?

A. St. Agnes in Fresno.

Q. Mrs. Arramone, did you have, or were pic- ures taken of Barbara either the first or second, r perhaps the third day [23] after you saw her n Fresno?

(Testimony of Mary Arramone.)

A. Yes, there was one taken at St. Agnes H pital.

Q. And were there any pictures taken of B bara some months prior to the time that she w involved in the collision?

A. Yes, there was.

Q. And first of all did you give to me pursua to my instructions that picture that was tak prior to the collision? A. Yes, I have.

Q. Mrs. Arramone, I show you a photogra and ask you if you recognize the photograph?

A. Yes, that is my daughter Barbara.

Q. And that picture was taken when?

A. That was taken six months before the ac dent.

Q. At home in Chicago?

A. Yes.

Mr. Nagel: May we, your Honor, introduce t photograph taken six months of Barbara Arramo prior to the collision of plaintiff's exhibit next order.

The Court: Plaintiff's Exhibit 21 for Plaint Arramone.

(The photograph referred to was mark Plaintiff Arramone's Exhibit No. 21.)

Mr. Nagel: Q. Mrs. Arramone, I show you a other photograph and ask you if you recogn this photograph? A. Yes, I do. [24]

Q. And this photograph was taken, if you kno when? A. In St. Agnes Hospital.

(Testimony of Mary Arramone.)

Q. In Fresno. And that was taken approximately how many days after the collision?

A. It was taken two days after——

(Witness weeping.)

Mr. Nagel: Your Honor, may we have this photograph introduced as Plaintiff's Exhibit next in order?

The Court: Plaintiff's Exhibit 22 for the Arramones.

(The photograph referred to was marked Plaintiff Arramone's Exhibit No. 22 in evidence.)

Mr. Nagel: Q. Mrs. Arramone, were there any further and additional pictures taken of Barbara, your daughter, some time after the first photograph was taken in the St. Agnes hospital?

A. Yes.

Q. Was Barbara still in California at that time?

A. Yes.

Q. And were they taken prior to — approximately how long prior to the time that you left for Chicago were they taken?

A. They were taken about a week before I left for Chicago.

Q. In Fresno? A. That is right.

Q. And at whose instructions were they taken?

A. By you, Mr. Nagel. [25]

Q. I show you three further and additional—well, I will show you these three photographs and ask you were those three pictures taken?

A. Yes.

(Testimony of Mary Arramone.)

Q. Approximately a week prior to the time tha you left for home, is that correct?

A. Yes.

Q. And while you were still in Fresno?

A. That is right.

The Court: Those three photographs may b marked Plaintiff's Exhibits 23, 24 and 25 respec tively for the Plaintiff Arramone.

(The three photographs referred to wer marked Plaintiff Arramone Exhibits 23, 24 an 25 respectively, in evidence.)

Mr. Nagel: Your Honor, I would like to as the Court's permission to, at this time, pass thes photographs to the jury.

The Court: Mr. Nagel, I suggest that you wai until later, because there is nothing — or am wrong? Assuming that they will only be a part o the evidence, there is nothing that you are goin to examine further about now on them?

Mr. Nagel: No, your Honor, but it is our belie that in order to understand the change in behavio and the change in the person, that the photograph of what actually did take [26] place are necessar explanations prior to the evidence we hope to intro duce.

The Court: All right, you may show them to th jury.

(The photographs were passed to the jury.

Mr. Nagel: Q. Mrs. Arramone do you kno how many days Barbara stayed at the St. Agne Hospital in Fresno?

(Testimony of Mary Arramone.)

A. Approximately four days.

Q. And then after that she went where?

A. She went to the home of my brother and his wife.

Q. In Fresno? A. That is right.

Q. By the way, when did you finally leave for Chicago? A. The 30th of September.

Q. And you and Barbara went together, did you? A. Yes, we did.

Q. And you went back how?

A. By train.

Q. During the time that Barbara was in the hospital, and during the time she was at your home —at the home of your brother, her uncle, was she attended by any doctors?

A. Yes, she was.

Q. First of all, I will ask you this: Did she see a dentist? A. Yes, she did.

Q. And was that Dr. Pearson?

A. Dr. Pearson.

Q. And did she also see any other doctors? [27]

A. Dr. Wolf and Dr. Wilde.

Q. Dr. Wolf did what for Barbara, if you know?

A. Barbara had a blood count, and she had medication.

Q. Did he attend her in the hospital also?

A. Yes, he did.

Q. As well as home?

A. And blood transfusions.

Q. Now, Mrs. Arramone, when once you arrived

(Testimony of Mary Arramone.)

home, and that is Chicago, Illinois, at the addre you have given us, did you take Barbara to a do tor? A. Yes, I did.

Q. And what doctor was that?

A. It was Dr. Smalley.

Q. And for how long has Dr. Smalley been t doctor for Barbara?

A. He has been the doctor all her life.

Q. Was he her doctor at the time she was bor

A. Yes.

Q. And has he been your family doctor?

A. Yes, he has.

Q. And has Barbara had any other doctors oth than Dr. Smalley, other than perhaps dentists? that the only physician and surgeon that she h seen in all the 17 years prior to the time the coll sion occurred?

A. Yes, he is the only one. [28]

Q. Now, I will ask you this, Mrs. Arramon Did Barbara visit Dr. Smalley more than once?

A. Yes, she has.

Q. And I will ask you this, did she see him i the last 30 days? A. Yes.

Q. May I ask you this, for the first six mont or thereabouts after she came back home how oft did she see Dr. Smalley on an average, how oft per week? A. About twice a week.

Mr. Fitzwilliam: I don't know whether I hea that. Will the reporter repeat it?

(Record read by reporter.)

Mr. Nagle: Q. Mrs. Arramone, during the la

Testimony of Mary Arramone.)

x months prior to the time that you came here
or the trial did Barbara see Dr. Smalley?

A. Yes, she has.

Q. On the average how frequently for the last
ree months, shall we say, how often did Dr. Smal-
y see her? A. About once a week.

Q. Dr. Smalley's offices are located how far dis-
nt from your home?

A. About an hour and a half drive by bus.

Q. Is that the means by which Barbara went
the doctor during those times you have men-
oned? [29] A. Yes.

Q. Now did she see a dentist in Chicago also?

A. Yes, she went to our family dentist.

Q. And that is Dr. Johnson? A. Yes.

Q. And did she see Dr. Johnson more than once?

A. Once, twice a week — twice a week in the
eginning.

Q. Can you give us an idea of what was done
nd how frequently she saw Dr. Johnson?

A. Yes.

Q. Now let me ask you this, Mrs. Arramone:
Some time after you arrived home did anything
nusual happen to—I will withdraw that question.
When she arrived home did you know that there
vas anything wrong with any one of Barbara's
vrists or arms?

A. Well, I didn't notice that until one day she
vent to make some tea, and she picked up a little
kettle on the stove and she dropped it. She said,
"Mother, my wrist."

(Testimony of Mary Arramone.)

So I said, "The next time we go in to Dr. Sma ley's we will have it X-rayed."

Q. What wrist was that?

A. That was her right wrist.

Q. Was there ever a cast applied to that wris

A. No. She has worn a leather wrist guard.

Q. Who applied that, do you know? [30]

A. Dr. Smalley.

Q. Now, Mrs. Arramone, I will ask you thi Referring to Plaintiffs' Exhibit No. 22, and th is the photograph that was taken in the St. Agn Hospital, and shows some suturing or stitching the right knee, have you, in observing Barba these past six months or a year noticed wheth there was anything different about that right kne anything unusual or different about the right knee

A. Well, I noticed it, she complained—she didn complain until we went to Church, and then noticed that she couldn't kneel on her knee.

Q. Well, let me ask you this question: Can sh now kneel upon the knee?

A. She kneels on it, but she complains of co siderable pain.

Q. Did you say that was the left or the rig arm? Was there a fracture of the wrist?

A. Yes, there was.

Q. Was it the right or left, do you recall?

A. I think I said the right.

Mr. Fitzwilliam: If your Honor please, I don know what the medical testimony is going to b but I will ask that that go out.

Testimony of Mary Arramone.)

Mr. Nagel: I have no objection.

The Court: It may go out. It may go out. Let's et the thing straight here: I think in the answer ne said that there [31] was a fracture. Everything fter that should go out. So start again from there.

Mr. Nagel: No objection, your Honor.

Q. Can you now tell us whether it was the left r the right arm that Barbara had this wrist band r the right arm that Barbara had this wrist and on?

A. I am so confused—I know she wore a wrist and.

Q. But you don't remember which, is that correct? A. I don't remember.

Q. Let me ask you this, Mrs. Arramone: Has Barbara, since she was involved in this collision been capable of doing any of the heavy housework round the home? A. No, she hasn't.

Q. Might we ask you this: After you went back ome did Barbara go back to high school?

A. Yes, she did. She went back some time the ast of October.

Q. And finished her senior year, is that correct?

A. Yes, she did.

Q. And did she, some time in the year 1954, seek nd obtain employment?

A. Yes, she did.

Q. And for whom did she work and in what ind of a job?

A. She worked for the Illinois Bell Telephone Company and she done typing, she was a typist.

(Testimony of Mary Arramone.)

Q. Now, for approximately how long did s
work? [32] A. Five and a half months.

Q. And do you know how much she earn
during that period of five and a half months?

A. She earned $1200.00.

Q. Was that gross pay?

A. That was gross.

Q. Do you know of your own knowledge n
why she did not continue her work?

Mr. Fitzwilliam: Well now, if your Hon
please, I am afraid that will call for a conclusi
of the witness.

The Court: The objection will be sustained.

Mr. Nagel: Your Honor, I would respectfu
suggest that it may not call for the opinion a
conclusion, if this witness knows.

The Court: Mr. Nagel, I don't see how it
humanly possible for this witness to know.
would be either what Barbara told her or wh
her employer told her. In other words, it would
hearsay. In other words, this witness can't see
hear for Barbara.

Mr. Nagel: Very well, your Honor, we will u
another witness.

The Court: I have no doubt it is admissi
under the proper circumstances, but not from th
witness.

Mr. Nagel: Q. Might we ask you this, M
Arramone: Did Barbara in working this five a
a half months, if she were [33] working steadi

(Testimony of Mary Arramone.)

each week how many days a week would she be required to work?

A. She was required to work five days a week.

Q. And on the average how many days did she actually work there?

A. From three to four days a week.

Q. Did you observe Barbara before she went to work at night—before she went to work in the morning and when she came home that evening, when she did go to work? A. Yes.

Q. Mrs. Arramone, will you tell us, prior to the time that Barbara was involved in this collision she was going to high school, is that correct?

A. Yes.

Q. Now, describe for us what her social activities prior to that time that she was involved in this collision were?

A. Barbara had a lot of social activities. She used to go—she loved sports and she done a lot of dancing and skating.

Q. Did she hold any offices in high school?

A. She was captain of her volley ball team.

Q. Did she hold any position in her class other than that?

A. Yes, I think she did. She was a student counsel, and a few others. I don't quite remember.

Q. Now, Mrs. Arramone, after this collision took place would you tell us what, if any, social activities Barbara [34] engaged in?

A. After?

Q. After? A. She didn't, any activity.

(Testimony of Mary Arramone.)

Q. What do you mean by that?

A. She just didn't care for any social life.

Q. Mrs. Arramone, have you ever taken Bar bara shopping at home?

A. Yes, I have.

Q. During any one or more of these occasion that you took her shopping did anything unusua occur?

A. Well, once or twice, I think it was twice, couple of ladies had come up and asked what ha happened to Barbara and if she was in an accident and Barbara turned and left me and went home all by herself.

Q. You say this happened twice when you wer with her? A. Yes.

Q. Did it ever happen when she was with any one else?

Mr. Fitzwilliam: That would be a conclusion your Honor. I will have to object on that ground

The Court: Mrs. Arramone, you understand from what we have been saying here, that you can't tell what someone else told you. Now, do you know this from what you saw yourself, or did some one tell you of some other incident?

A. Now, this is what I know myself. [35]

Q. You saw this yourself? A. Yes.

The Court: You may answer.

Mr. Nagel: Q. Mrs. Arramone, to your own knowledge did this ever happen with Barbara con cerning someone else other than yourself, leaving for home?

(Testimony of Mary Arramone.)

A. I am quite sure it did.

Q. Do you know with whom she was upon that occasion? A. I am sure—Yes.

Q. Who was that person?

A. My sister.

Q. That is Barbara's auntie? A. Yes.

Q. Well, what happened on that occasion, if you know? A. Well, she went home also.

Q. Mrs. Arramone, does Barbara ever go to motion pictures, to see motion pictures?

A. Yes, once a week, about, and it is mostly at night.

Q. Have you observed any unusual conduct that occurs with Barbara during the day that is different from her conduct as it was as you observed prior to the time that she was involved in this collision?

A. Well, as much as I am at home—I mean I am employed—I do call her to awaken her, she sleeps late, and sometimes I have to awaken her at my ten o'clock break, or she would sleep [36] on to 2:00 or 3:00 in the afternoon, so I call her by phone. And then I have noticed when I get home that she has the blinds all down, and she loves to sit in the dark.

Q. Can you explain what you mean by that?

A. Well, she pulls down the shades and she puts out the lights. She doesn't like a bright light in her eyes.

Q. Let me ask you this concerning these window

(Testimony of Mary Arramone.)

shades, does she pull down more than one window shade? A. She pulls them all down.

Q. And that is during the day? A. Yes.

Q. Has that happened more than one time?

A. It happens all the time.

Q. Now you have stated that she likes to stay in the dark. What do you mean by that?

A. Well, she will pull down the shades and then at night she will put out the lights and she will sit in a chair all by herself.

Q. Without any lighting, is that correct?

A. She doesn't like the light.

Q. Is that just in the room that she happens to be in or——

A. All over the house, she will go around and put out the lights.

Q. Has that happened more than once?

A. Yes, it happens—— [37]

Q. And for how long has this pulling of shades and turning out of lights taken place?

A. In the beginning I didn't take too much notice, but she has been doing it all the time more and more.

Q. This condition is getting better or worse?

A. To me it is getting worse.

Q. Mrs. Arramone, have you ever watched Barbara while she was sleeping? A. Yes.

Q. Is there any difference that you can observe in one eye as distinguished from another?

A. Well, Barbara has a short eyelid on one eye; the eye doesn't cover completely.

Testimony of Mary Arramone.)

Q. What do you mean by doesn't cover completely?

A. Well, half of the eye is exposed when she loses her eyes and goes to sleep.

Q. You mean the lid doesn't close all the way?

A. That is right.

Q. How much of that lid is it that doesn't close when she sleeps?

A. I haven't measured it, but I would say about fourth of an inch.

Q. Is that still in existence?

A. Yes, it is.

Q. Well, have you observed Barbara, and her yes particularly, [38] when she gets up in the norning?

A. Well, this eye is generally bloodshot in the norning, and she complains of a burning sensaion in it.

Q. Has that situation existed throughout these ast 19 months?

A. It has existed ever since the accident.

Q. And it is a situation that exists now?

A. Yes.

Q. Have you noticed any difference in Barbara's leeping habits or the method and manner in which he sleeps now as distinguished from the way she sed to sleep prior to the time she was involved n this collision, Mrs. Arramone?

A. Barbara, yes.

Q. And would you be kind enough to point out

(Testimony of Mary Arramone.)

to us those differences, if you have observed them yourself?

A. Barbara was a sound sleeper, she always was, and of course since the accident she has nightmares and she will wake up during the night and complain of being thirsty, and at first I used to wonder why she used to get up so much. So I got up to answer her and I said "What seems to be the trouble,"——

Q. Mrs. Arramone, you aren't supposed to say what conversation took place, but just tell us what you observed, what you saw. May I ask you this: Did Barbara get up more than once at night?

A. Yes.

Q. Does she still do that?

A. She does. [39]

Q. And how frequently does she get up during the usual normal night now?

A. About twice.

Q. And do you know why that happens?

A. She complains of being thirsty.

Q. Have you observed her condition in the morning?

A. Well, she happens to sleep with her mouth open. She claims she can't breathe.

Q. You have told us that Barbara has nightmares. Does she make any noise that you can hear?

A. She talks quite a bit in her sleep.

Q. Did she ever do this prior to the time that she was hurt?

(Testimony of Mary Arramone.)

A. I have never noticed it before.

Q. May I ask you this: Would you tell us this: How does Barbara, in sleeping in the bed—let me ask you this, how many pillows does she use now?

A. Barbara has been using two pillows and she props herself up.

Q. Is that in a half-way sitting position, is that what you mean? A. Yes, sir.

Q. Does she still do that?

A. She still does that.

Q. Do you know why?

A. She complains that she can't breathe through her nose.

Q. What is Barbara's weight, approximately now, do you know? [40] A. 92 pounds.

Q. And what was her normal weight say a week or ten days or thereabouts prior to the time that the collision took place?

A. Between 116 and 117 pounds.

Q. Have you noticed any difference in her appetite now as distinguished from what it was before?

A. She has a very poor appetite.

Q. Have you noticed any difference in—does she tire easily now—or may I withdraw that. Is she able to do any housework without tiring during the day?

A. Barbara don't take no interest in housework.

Q. What does she take an interest in?

A. Not very much of anything.

Q. Mrs. Arramone, have you had an opportunity to observe the difference, if any, there may be or

(Testimony of Mary Arramone.)
may not be in Barbara's memory now and as you observed it these last nineteen months as distinguished from her memory prior to the time that she was injured? A. Her memory?

Q. Yes. A. She is very forgetful.

Q. What has happened to make you make the statement that you just have? What have you observed?

A. She forgets appointments, she forgets to do certain little things that I have left for her to do, she also forgets about [41] everything that I have ever mentioned for her to do.

Q. Do you have to remind her to do the same thing more than once?

A. I have to remind her several times.

Q. Have you noticed——

Mr. Nagel: I am sorry, your Honor, it is 12:00 o'clock.

The Court: Will you be some while, Mr. Nagel?

Mr. Nagel: Yes. We still want to go into the special damages.

The Court: All right, we will take the noon recess at this time. Ladies and gentlemen of the jury we will take a recess until the hour of 1:30, half past one, today, at which time we will return and resume the trial of this case. The jurors will remember the admonition the Court has heretofore given you.

(Thereupon a recess was taken until 1:30 p.m. this date.) [42]

Wednesday, April 6, 1955, 1:30 p.m.

Mary Arramone resumed the stand and testified further as follows:

Direct Examination—(Continued)

The Court: The jurors are all present. You may proceed.

Mr. Nagel: Your Honor, may we have the reporter read the last question and answer?

The Court: You may.

(Record read.)

Mr. Nagel: Q. Mrs. Arramone, did Barbara ever enroll in a college in the past year or so?

A. Yes, sir.

Q. What college?

A. DeKalb College.

Q. Is that D-e-K-a-l-b?

A. That is right.

Q. Do you know what course of study she chose? A. She chose dental technician.

Q. May I ask you this: Did she ever attend any classes at this college?

A. No, she did not.

Q. Did she pay her registration?

A. Yes, she paid a part payment.

Q. Mrs. Arramone, have you observed Barbara in her ordinary [43] walking habits during these past 19 months? A. Yes, I have.

Q. And would you tell us what, if anything you have noticed about her walking habits that was unusual?

A. Well, Barbara walks more to the right.

(Testimony of Mary Arramone.)

Q. What do you mean by that?

A. Well, if we walk on a sidewalk she will verge towards the right with her right foot, and she sort of walks crooked.

Q. Is it a swerving to the right?

A. Yes, it is.

Q. Do you know of your own knowledge whether she is or is not conscious of that swerving to the right?

Mr. Fitzwilliam: Oh, if your Honor please, that calls for a conclusion.

Mr. Nagel: I will withdraw the question.

Q. How long has this been going on to your knowledge, Mrs. Arramone?

A. Well, I have noticed it in the last year more and more.

Q. Mrs. Arramone, do you of your own knowledge, know whether Barbara has had any blackouts in the past 19 months?

A. She has, to my knowledge, had three blackouts.

Q. What happened when this occurred?

A. Well, the first time she got one she fell on the floor. The second time she sort of groped the wall.

Q. What do you mean by that? [44]

A. Well, it seems like she got dizzy and she groped up against the wall. The first time she fell completely on the floor.

Q. Do you know how long that blackout, what-

(Testimony of Mary Arramone.)

ever it was, lasted on this first occasion when she fell?

A. I don't recall. It didn't last very long.

Q. Do you know whether she has had any headaches these last 19 months?

Mr. Fitzwilliam: If your Honor please, that definitely calls for a conclusion.

The Court: The objection will be sustained.

Mr. Nagel: Q. Has she ever complained to you of headaches during these past 19 months?

A. Yes, sir.

Q. Has she complained to you more than once about headaches?

A. She always complains of headaches.

Q. Mrs. Arramone, I will ask you this. First of all, concerning the headaches, have those complaints become more numerous as time goes on? In other words, has there been more complaints about these headaches in the past, say, six months, or have there been a fewer number of complaints?

A. She complains more.

Q. Concerning the nightmares that you have told us about, has that condition grown better in the past six months or worse?

A. It has grown worse. [45]

Q. Mrs. Arramone, I will ask you this: These scars that are on Barbara's face, have you noticed any difference in the appearance of these scars during certain times of the day or certain weather changes?

A. Oh, yes, when it gets cold they get bright

(Testimony of Mary Arramone.)

and especially if she is fatigued toward evening they show more.

Q. What do you mean, have they a different color? A. They are more noticeable.

Mr. Nagel: In the interest of saving time, Mr. Fitzwilliam, I would suggest that perhaps you could stand up here with me and we can go through these bills in chronological order, and introduce them as one exhibit.

Mr. Fitzwilliam: Oh, yes.

Mr. Nagel: Q. Mrs. Arramone, do you know that Barbara went to the San Joaquin General Hospital? A. Yes.

Q. Did you and your husband, Mr. Dominick Arramone, receive a bill from the San Joaquin General Hospital in the amount of $140.00?

A. That is right.

The Court: May I suggest that you have these bills here perhaps certain of them counsel will be willing to concede be admitted in evidence, without assuming any responsibility.

Mr. Fitzwilliam: That is right, as long as the jury [46] understands the nature of the stipulation.

The Court: That is what I am suggesting. There is a certain amount of legal procedure to go through, and if there is no objection you can concede that they be admitted in evidence without admitting any responsibility.

Mr. Fitzwilliam: Yes, all right.

Mr. Nagel: Your Honor, may I introduce these?

Mr. Fitzwilliam: As far as any objection to

Testimony of Mary Arramone.)

ıese as to being reasonable or the fact they were ıcurred because of this accident, there will be none. Therefore I submit they may go in evidence with ıe understanding that there is no admission of ability.

The Court: All right. Then, for the record why on't you just read them off then, Mr. Nagel, and will just give them numbers.

Mr. Nagel: Thank you, your Honor.

First is a bill from the San Joaquin General Hospital in the amount of $140.00.

Next there is Jones Ambulance bill in the amount f $69.00.

Next there is a bill from the St. Agnes hospital ı Fresno in the amount of $148.50.

Next there is a bill from Dr. George Wolf of Fresno in the amount of $50.00.

Next there is a bill from Dr. A. W. Pearson, a entist in [47] Fresno, and his bill is $27.50.

Next there is an X-ray bill in the amount of 10.00 from Doctors Milholland, McGehee, Leef nd Keep.

The Court: How much is that?

Mr. Nagel: $10.00, your Honor.

Next there are three bills attached together here oming from St. Luke's Hospital in Illinois, totaling $167.55.

Next we have drug and medical bills totaling 62.90, and further receipts totaling $5.76 which vere for cosmetics——

Q. Is that correct, Mrs. Arramone?

(Testimony of Mary Arramone.)

A. That is right.

Mr. Nagel: We have a bill from Dr. Voris, Harold C. Voris, in the amount of $25.00.

And we have a bill from Dr. Paul V. Carelli M.D., in the amount of $25.00.

Next, your Honor, we have a bill from Charles J. Smalley, M.D., Chicago, Illinois, in the amount of $126.00. May I just make this comment: The bill is for January 4th to and including March 18 1955, and, again, that bill is in the amount of $126.00

Next there is a receipt for $25.00, Sutter Hospital of Sacramento.

Mr. Fitzwilliam: The date of that bill is what

Mr. Nagel: That is March 30, 1955.

Mr. Fitzwilliam: Thank you. [48]

Mr. Nagel: Next we have a bill from Dr. Lawrence R. Johnson. He was Barbara's dentist in Chicago? A. Yes.

Mr. Nagel: And that bill is $462.00.

Mrs. Arramone——

The Court: That is all of them now?

Mr. Nagel: Yes, your Honor.

The Court: Wait, let me get these marked. Let those bills be marked Plaintiffs' Exhibits 26 to 38 respectively, starting in the order that they were listed—you have got them in that order, have you not

Mr. Nagel: Yes, your Honor.

The Court: All right, in that order they will be marked as Plaintiffs' Exhibits 26 to 38, respectively, for the Plaintiff Arramone.

(Testimony of Mary Arramone.)

(The documents referred to were marked Plaintiff's Arramone Exhibits 26 to 38, both inclusive, in evidence.)

Mr. Nagel: Q. Mrs. Arramone, I haven't asked you anything concerning any bill from Dr. Paul Greeley, the Plastic Surgeon, have I?

A. No.

Q. Nor have I asked you anything concerning any bill from Dr. Smalley up to November the 2nd or 3rd of 1954? A. No.

Q. Now I will ask you, during the months of November and December did Barbara continue to see Dr. Smalley? A. Yes, once a week.

Q. And we have no bill in evidence for November and December of 1954, is that correct?

A. No.

Q. Have you noticed any difference in Barbara's smile now as compared to what it was prior to her injury, Mrs. Arramone? A. Yes.

Q. What is the difference that you have noticed? A. Barbara has only a half smile.

Q. What do you mean by that?

A. She doesn't smile a complete smile, she can only smile with part of her mouth.

Mr. Nagel: No further questions of Mrs. Arramone at this time, your Honor.

Mr. Pacht: We have no questions, your Honor.

Mr. Fitzwilliam: I have no questions, your Honor. Thank you.

Mr. Nagel: Your Honor, with the Court's permission we would ask that we be allowed to read

Dr. Paul Greeley's, the plastic surgeon, deposition into evidence. I might state we have gone over the deposition with Mr. Fitzwilliam and we have ironed out all possible difficulty. However, in the light of the shortage of the number of depositions, it probably—— [50]

Mr. Fitzwilliam: I think this, your Honor, that we will have to share one.

Mr. Stutsman: There are two corrected copies, your Honor.

The Court: The original is not corrected?

Mr. Nagel: No, we haven't, your Honor.

Mr. Fitzwilliam: May we read it into the record as corrected?

The Court: All right, you may. This evidence will apply only to Barbara Arramone.

Mr. Nagel: That is correct, your Honor.

Mr. Fitzwilliam: Rather than reading the entire preamble, I think counsel can tell us where and when the deposition was taken and under what circumstances.

The Court: Yes. It was taken by stipulation, wasn't it?

Mr. Nagel: Yes, your Honor.

The Court: And it was a deposition taken by stipulation of the parties?

Mr. Nagel: Yes, it was.

Mr. Fitzwilliam: In Chicago.

Mr. Nagel: In Chicago.

This deposition was taken on the first day of November, 1954.

May we commence with page 3, your Honor?

DEPOSITION of DR. PAUL WEBB GREELEY

(Mr. Nagel reading the questions and Mr. Stutsman reading the answers.)

'By Mr. Nagel:

Q. Doctor, what is your full name?

A. Paul Webb Greeley.

Q. Dr. Greeley, are you a duly licensed and practicing physician and surgeon in the State of Illinois? A. I am.

Q. And where are your offices located?

A. 224 South Michigan Boulevard in Chicago.

Q. Now, Dr. Greeley, would you please relate the schools that you have attended and the degrees you have earned prior to being licensed as a physician and surgeon?"

Mr. Fitzwilliam: (Reading "Let me say this, for the purpose of the record, that we will agree that the Doctor is eminently well qualified, in order to expedite and shorten the record, if you so desire."

Mr. Nagel: "Mr. Nagel: I appreciate your offer, Mr. Pause, but I believe that we would like to have Dr. Greeley's background."

The Court: May I interpose a suggestion here, that when you spoke, Mr. Fitzwilliam, you were speaking for Mr. Pause who represented your office at the time this deposition was taken? [52]

Mr. Fitzwilliam: That is right.

The Court: So when the response sounded like it was addressed to Mr. Pause, you are simply here

(Deposcition of Dr. Paul Webb Greeley.)
in lieu of Mr. Pause who assisted you in taking that deposition in Chicago?

Mr. Fitzwilliam: That is right.

The Court: I would like to make that clear. Proceed.

Mr. Nagel: (Reading) "Would you be kind enough to answer my question?

"A. I graduated with a bachelor of arts degree from the University of Illinois in 1923, and Doctor of Medicine degree from Northwestern Medical School in 1927.

Q. Where did you intern, Doctor?

A. The Evanston Hospital.

Q. That is located where?

A. Evanston, Illinois.

Q. Where did you commence the practice of medicine? A. In the State of Illinois.

Q. And when did you so commence the practice of medicine? A. In 1929.

Q. Dr. Greeley, have you had any special training?

A. I have been trained, in addition to my internship, with three years' training in general surgery, two years' additional training in plastic surgery.

Q. Now, do you specialize in any particular branch of medicine? [53]

A. I specialize in plastic surgery.

Q. Now, what do you mean by specializing in plastic surgery? What does it mean to the layman?

A. It covers a large variety of instances, but

(Deposition of Dr. Paul Webb Greeley.)

predominantly the reconstruction or the repair of injuries to the face, the correction of congenital deformities, reconstructions following surgical defects of the face and hands, following injuries, removal of tumors, and so forth.

In this particular instance having to do with the repair of post-traumatic scars of the face.

Q. How long have you specialized in this plastic surgery as you have described it?

A. Since 1936.

Q. Have you constantly and continuously practiced your specialty since then?

A. I have.

Q. In what hospitals did you practice?

A. I take all of my private patients at St. Luke's Hospital in Chicago, and I also have charge of the Plastic Surgery Service at the University of Illinois College of Medicine; consulting surgeon at the United States Veterans' Administration Hospital at Hines, Illinois, and also at the United States Naval Hospital at Great Lakes.

Q. Now, Dr. Greeley, in the practice of your profession, [54] and more particularly the practice of your specialty, did you have occasion to examine and subsequently treat Barbara Arramone?

A. I did.

Q. Where did you first see her?

A. I saw her in my office.

Q. And when was that?

A. October 8, 1953.

(Deposition of Dr. Paul Webb Greeley.)

Q. You are referring to documents. Are those documents made by yourself?

A. Yes, sir.

Q. Relating to your treatment and care of Barbara Arramone? A. They are.

Q. Now, at the time that you saw her did you, Doctor Greeley, obtain a history from her?

A. Yes, I did.

Q. What was that history that you obtained?

A. May I quote from my record?

Q. Surely.

A. She was referred to me for the care of multiple facial scars which had been received during an automobile injury that had occurred in California.

Q. Now, Dr. Greeley, at that time did you make a physical examination of Barbara Arramone on this occasion when you [55] saw her?

A. I did, in so far as it involved her injury.

Q. Would you relate the findings of your physical examination at that time?

A. This patient had multiple diffuse irregular facial scars that were disfiguring, by all standards of measurement.

Q. I first show you this photograph, which shows a picture of a young girl, and I will ask you: Do you recognize that photograph?

A. I do."

Mr. Nagel: Your Honor, maybe we ought to just take the photographs — whatever the Court thinks will be the most orderly——

(Deposition of Dr. Paul Webb Greeley.)

Mr. Stutsman: They are in with the original eposition. There are two or three of them, aren't here?

Mr. Nagel: Yes. May I repeat my prior question? "I first show you this photograph, which hows a picture of a young girl, and I will ask ou: Do you recognize that photograph?

A. I do.

Q. And that is a photograph of whom?

A. Barbara Arramone.

"May we identify this picture, referred to by Dr. Greeley, as Plaintiff's Exhibit G-1 for identification?" [56]

Mr. Nagel: May we, at this time, offer Plaintiff's Exhibit G-1, heretofore identified, into evidence.

The Court: Is that different from the photographs that were offered this morning?

Mr. Nagel: Yes, your Honor. They do show certain aspects of the injury.

Mr. Fitzwilliam: In order to save time I will stipulate they all go in now at this time. They are all marked for identification, your Honor.

The Court: All right, let us just have them marked now so we can proceed without further delay. How are they identified there?

The Clerk: G-1 is the first, G-2 is the second, and G-3 is the third.

The Court: All right, let them be marked in evidence in that numerical order, Plaintiff's Exhibits 39, 40 and 41 for the Plaintiff Barbara Arra-

(Deposition of Dr. Paul Webb Greeley.)

mone, and they will be received in evidence at this time.

(The photographs referred to were marked Plaintiff's Exhibits 39, 40 and 41.)

Mr. Nagel: (Reading)

"Mr. Nagel: Q. May I next show you a photograph of a young girl, which shows primarily the left face, and I will ask you, Dr. Greeley, do you recognize that photograph?

"A. I do, as Barbara Arramone.

"May we identify that as Plaintiff's Exhibit G-2 for identification."

Mr. Nagel: Your Honor, that is now in evidence. Maybe we can leave out——

The Court: That is in evidence as Plaintiff's Exhibit 40 in this case?

Mr. Nagel: Yes, your Honor. (Continuing reading): "Q. Dr. Greeley, I next show you a third picture, which purports to be a photograph of a young girl, showing the right face, and ask you if you recognize that face?

"A. I do, as Barbara Arramone.

"May we identify this third photograph as Plaintiff's Exhibit G-3 for identification?"

The Court: That is Plaintiff's Exhibit 41 in this case.

Mr. Nagel: (Reading)

"Q. Dr. Greeley, I have asked you in one of my prior questions whether you made a physical examination, and I have asked you to relate the findings of your physical examination. May I ask you,

Deposition of Dr. Paul Webb Greeley.)

rst of all, would looking at these photographs as-
st you in telling us what your physical findings
ere? A. Yes.

Q. Upon that occasion? [58] A. Yes.

Q. I show you first of all Plaintiff's Exhibit that
e have entitled G-1 for identification and ask you
use that photograph to answer my question of
hat your physical findings related.

A. Well, there is a curved disfiguring scar aris-
g in the central portion of the forehead, from the
ft side, that extends downwards laterally towards
ie right and into the right upper eyelid. I would
timate this scar to be approximately three inches
overall length, by an average of 3/16 inch in
idth.

Q. Continue, doctor?

A. There is another scar just below this tran-
cting the glabella that extends from the medial
spect of the left orbit, across the glabella and into
ie right upper lid. This scar averages ¼ inch in
eight and is roughly 2½ inches in overall length.
I can see a vertical scar arising from the left
row to the eyebrow upwards, and disappearing
ito the hairline in the left frontal area, that I
ould estimate to be four inches in overall length,
y one-eighth inch in width.

There is a transverse scar across the central por-
on of the nose that is one-half inch in height
its maximum width, and is approximately 1½
ches in overall transverse length. [59]

There is a scar arising from the left angle of the

(Deposition of Dr. Paul Webb Greeley.)

mouth that extends upwards over the malar eminence of the left cheek. This scar is 4½ inches in over-all length, by an average of 3/16 inch in width.

There is also noted that she has a complete loss of the nasal labial fold on the left side when she smiles, which to me is indicative of having arisen from a division, with subsequent paralysis, of the middle branch of the left facial nerve.

There is a curved edematous flap-like scar involving the right half of the chin, that extends up into the vermillion border of the lower lip in its medial aspect. This is approximately one inch in over-all diameter, and the scar around the periphery is nearly two inches in over-all length.

There are other scars in the right cheek which are difficult to identify from this photograph view.

Q. May I, Dr. Greeley, show you another photograph entitled Plaintiff's Exhibit G-3 for identification, showing the right side of a young girl, and ask you if that will better enable you to further describe the scars upon the right side?

A. There is a transverse scar over the right zygomatic arch that is one-fourth inch in height by two inches in over-all length. [60]

There is another smaller scar just lateral to the right nasocanthal fold that is one inch in height by one-eighth inch in width.

Q. Dr. Greeley, I will show you a third photograph, entitled Plaintiff's Exhibit G-2 for identification, showing the left side of a young girl, and ask you whether that photograph will further en-

(Deposition of Dr. Paul Webb Greeley.)

able you to describe the physical findings that you made upon the occasion that you are testifying to at this time?

A. I do not feel that it gives any additional information over and above what I have already described.

Q. Now, Dr. Greeley, I will ask you this: Do those three photographs portray the condition that Barbara Arramone was in at the time that you first saw her upon the occasion that you have testified to? A. They do.

We are asking, then, that these three pictures be entered into evidence, Mr. Pause."

Mr. Fitzwilliam: And they have been.

Mr. Nagel: And they have been. (Continuing reading.)

"Q. Now, Dr. Greeley, since Barbara saw you upon the first occasion, did you subsequent thereto perform plastic surgery? A. I did.

Q. And upon what occasion was that? [61]

A. It was on October 19, 1954.

Q. And where was the surgery performed?

A. At St. Luke's Hospital in Chicago.

Q. Doctor, would you be kind enough to tell us in detail what you did at the time, and upon the occasion that this plastic surgery was performed? And if it will assist you, you can use these three photographs. And I respectfully suggest that when and if you do use these photographs in trying to tell us what you did, that when you use a particular picture, you call it G-1, 2, 3.

(Deposition of Dr. Paul Webb Greeley.)

A. In order of sequence at the operation, the curved scar in the central portion of her forehead and that transecting the glabella were excised completely. Following this, after wide undermining of the adjacent tissues, in order that the wound could be closed without tension, they were then sutured together with multiple interrupting sutures of 6-0 nylon, using approximately 50 sutures in these two scars.

The next scar that was excised was that one arising from her left brow that extended up within the hair line in the left frontal area. After excision of this scar, the borders were undermined freely, and the wound closed with interrupted sutures, plain and horizontal mattress sutures of 6-0 nylon, using approximately 35 total stitches.

The next scar to be excised was that arising from the left [62] angle of her mouth. After excision of this scar and before it was closed, a so-called Z-plasty was injected.

Q. Could you tell us why that was made?

A. The Z-plasty was injected along the suture line in order to stagger the suture line and break up the straight line pull that was producing a certain amount of distortion from the left angle of her mouth. This wound was then closed with approximately 35 sutures of 6-0 nylon.

The next scar to be excised was that over the right zygomatic arch and on the right cheek. After excision and undermining the adjacent skin flaps

(Deposition of Dr. Paul Webb Greeley.)

involving these two scars, the wounds were closed with approximately 20 interrupted sutures of 6-0 nylon.

The next scar to be excised with the edematous flap involving the right half of her chin. In addition to excising the scar, the flap was lifted up and thinned so as to minimize its thickened appearance, following which it was reinserted into its bed and the skin margins closed with approximately 30 interrupted sutures of 6-0 nylon.

The final scar to be excised was that transecting the dorsum of the nose. Because of the gap in this area, it was impossible to close this without placing undue tension on the skin edges; consequently, an operation was then carried out to shorten her nose in such a manner that the tip of her nose was brought up and thus shortening the [63] gap between the skin edges, and permitting an effective cosmetic closure of this wound.

The wound was closed with approximately 15 interrupted sutures of 6-0 nylon and two interrupted sutures of 4-0 chromic catgut within the nose.

Extensive pressure dressings were then placed over all the operative sites.

Q. Dr. Greeley, how long a period of time did you and your assistants take in performing these procedures that you have just outlined?

A. Approximately three hours.

Q. And do you know how long a period of time Barbara Arramone was hospitalized as a result of the surgery that you performed?

(Deposition of Dr. Paul Webb Greeley.)

A. She was hospitalized from October 19th through 23rd of 1954.

Q. Dr. Greeley, do you have an opinion based upon medical certainty, as to the amount of cosmetic recovery that you will be able to obtain if you continue with Barbara's treatment in your specialty?

A. I would estimate that 75 per cent cosmetic improvement might be effected from the surgery that has been and might subsequently have to be carried out. In other words, she might anticipate a total of 25 per cent total permanent disability, cosmetically speaking. [64]

Q. Doctor, your opinion concerning the permanent disability from the cosmetic point of view is what per cent? A. Twenty-five per cent.

Q. Dr. Greeley, aside from the cosmetic disfigurement residual that you have just told us about, are there any other permanent effects that Barbara will have from the accident? And my question is directed solely to an answer that anticipates that you will answer within your specialty.

A. Objectively—I will qualify it—I would expect her to have a permanent paralysis involving the middle branch of the left facial nerve, which will cause inability to smile through the left angle of the mouth; and secondly, she cannot completely close her right upper eyelid because of some residual scar contracture that causes a mechanical block.

Q. Now, Dr. Greeley, do you have an opinion, based upon medical certainty, as to the need for

(Deposition of Dr. Paul Webb Greeley.)

uture plastic surgery in order to effect a greater egree of cosmetic recovery?

A. I believe she will have to have a few things one.

Q. Dr. Greeley, what have been your total harges to date for your treatment of Barbara rramone?

A. The total charges up to this minute are 25.00 for pre-operative work carried out in the of-ce, and $1250.00 for operation and after care in ne hospital. [65]

Q. Dr. Greeley, in your professional opinion, as physician and surgeon, are those charges reason-ble? A. I believe they are.

Q. Now, Dr. Greeley, would you give us your stimate of the probable reasonable future cost of edical treatment you believe to be reasonably nec-ssary for Barbara Arramone?

I will ask you, before you answer the question, r. Greeley, this prior question:

In your opinion, based upon reasonable medical rtainty, is it necessary that further and additional uture work be done concerning Barbara?

A. Yes.

Q. As a physician and surgeon, would you give s your opinion, based upon medical certainty, as to ne probable reasonable cost of such future medical reatment by yourself?

A. I would estimate that my fee would not ex-eed $500, and that the hospital charges would not xceed a similar amount.

(Deposition of Dr. Paul Webb Greeley.)

Q. Now, Dr. Greeley, this probable reasonable future cost of $500.00, is that in your opinion, a reasonable charge? A. It is.

Q. And from your knowledge, have you had extensive dealings with the hospital in these matters?

A. I have.

Q. And is your opinion as to the probable future cost of $500.00 based upon your experience in these regards? A. It is.

Q. And is that estimate of $500.00 for this probable future hospitalization, in your professional opinion, a reasonable charge? A. It is.

"I have no further questions of Dr. Greeley."

"Cross Examination"

(The questions being read by Mr. Fitzwilliam and the answers being read by Mr. Stutsman.)

"Q. Dr. Greeley, you refer to some notes that you had in your hand. May I look at those, please?

Dr. Greeley, you saw Barbara Arramone for the first time on October 8, 1953, is that correct?

A. Correct.

Q. And that was about a month and eight days after the date of the accident?

A. Approximately.

Q. Doctor, in connection with the work that you have performed for Barbara Arramone, you have obtained an excellent result in that regard up to this time, haven't you?

A. I think she is progressing very satisfactorily.

Q. And I believe you anticipate that you will do

(Deposition of Dr. Paul Webb Greeley.)

some further work; that was your testimony, is that correct? A. Correct.

Q. In connection with the surgery that was performed on the plaintiff, Barbara Arramone's nose, you obtained a symmetrical and good cosmetic result in relation to that injury that you described on the tip of her nose, didn't you, doctor?

A. I feel it's acceptable.

Q. And when was the last time that you attended and treated Barbara Arramone, based on your best recollection? A. Last week.

Q. This past week? A. This past week."

Mr. Nagel: May we insert here, your Honor, that this was taken on November 1, 1954, that statement.

Mr. Fitzwilliam: (Continuing reading.)

"Q. All right. And she has been in surgery but once? A. That is correct.

Q. And that was in October of 1954, within the past week, is that correct? October 19th to October 23rd?

A. Yes, October 19th, I believe it was.

Q. And the photographs that were identified by counsel representing the plaintiff were photographs that were taken before the operative procedure that you performed? [68] A. That is correct.

Q. The surgery that was performed on the scars in the forehead that you have described, you obtained an excellent result in that regard, is that correct?

A. I think they are very good, considering what we started out with.

(Deposition of Dr. Paul Webb Greeley.)

Q. Now, between October 8th of 1953 and October 19th of 1954, you performed no surgery at all?

A. Correct.

Q. Was there any treatment administered at all by you between October 8th of 1953, and October 19th of 1954? A. There was not.

Q. All right. Did you have occasion to attend or treat Barbara Arramone between October 1953 and the time that she entered the St. Luke's Hospital?

A. She was in my office once, I believe, in early October of this year.

Q. In relation to the cosmetic result that you have obtained after the surgery that you have described, I take it that powder and cosmetics will, in large part, cover the remaining scarring that you have already related, is that correct, doctor?

A. I would say it would be difficult to disguise it with cosmetics.

Q. The contour of the chin is good by reason of the operative [69] procedure that was performed on this edematous flap-like scar that you mentioned, is that correct? A. Yes, it is improved.

Q. And time, of course, will aid additionally in the improvement, isn't that true, doctor?

A. That is correct.

Q. In a letter that you directed to the attorney representing your patient, Mr. Nagel, dated October 8th of 1953, in the last paragraph of that correspondence, did you there mention that your fee for caring for Barbara Arramone and the surgery that you contemplated a year ago would be $750.00?

(Deposition of Dr. Paul Webb Greeley.)

A. I believe I made that estimate. I would have to see the letter, but actually there was more surgery involved than met the eye when they came to do it a year later.

Q. You also mentioned in that same correspondence to counsel representing the Plaintiff Barbara Arramone, that potential minor procedures by way of surgery would cost possibly an additional $250.00?

A. I might have said that at that time. That was the first time I saw the patient, of course.

Q. In rendering an opinion as to the result and the cosmetic defect that you have mentioned, and the permanent aspect in regard to the cosmetic defect, did you take into account the fact that a woman, of course, will use cosmetics, [70] such as powder and rouge to cover? A. I did.

Q. That is, cover her face?

A. She would still have 25 per cent deformity, whichever way you look at it."

Redirect Examination

(The questions being read by Mr. Nagel and the answers being read by Mr. Stutsman.)

"Q. Just one question, Doctor: Since your original estimate of October 8th, you have already testified that there was more surgery performed than you had originally anticipated. In addition to that, did you have brought to your attention, did you find further and additional disabilities, such as perhaps the right eye, that were not fully brought to

(Deposition of Dr. Paul Webb Greeley.)
your attention upon the first occasion that you saw her?

"A. That was one thing. But predominantly the amount of additional work was based around the fact that what scarring appeared on the outside was only part of it. There is much diffuse scarring spread out underneath that you could not see until you were actually in the operating room, all of which involved a lot more surgery.

"No further questions."

Mr. Fitzwilliam: "That's all."

Mr. Nagel: May we next, your Honor, with the Court's [71] permission proceed into Dr. Johnson's, the dentist's, deposition?

The Court: Yes.

Mr. Nagel: Your Honor, this deposition too was taken in Chicago, on November 2, 1954.

DR. WARREN R. JOHNSON

(Thereupon the deposition of Dr. Warren R. Johnson was read into the record, Mr. Nagel reading the questions and Mr. Stutsman reading the answers:)

"Q. Dr. Johnson, you have been sworn, have you? A. Yes, sir.

Q. I perhaps should tell you that this is the time and place set for your deposition, and that means that I, as the attorney for Barbara Arramone will ask you certain questions and you will be asked to answer those questions and the shorthand reporter will, even as he is now, take down all the questions

(Deposition of Dr. Warren R. Johnson.)

and all the answers, and if at any time I ask you a question that is not clear to you, please do not hesitate to ask me to clarify the question.

Would you be kind enough to give us your full name, Doctor? A. Warren R. Johnson.

Q. Dr. Johnson, are you a duly licensed and practicing Doctor of Dental Surgery?

A. Yes, sir.

Q. In the State of Illinois? [72] A. Yes.

Q. And your offices are located where?

A. 3215 West North Avenue.

Q. Dr. Johnson, would you kindly relate the schools that you have attended and the degrees that you have earned prior to being licensed as a dentist?

A. In undergraduate work I attended the University of Notre Dame and Northwestern University, and in order to attain the degree of D.D.S., I attended Northwestern University School of Dentistry.

Q. Where did you commence the practice of dentistry, doctor?

A. At 3215 West North Avenue in 1951.

Q. That is here in Chicago, Illinois.

A. Yes, that is here in Chicago, Illinois.

Q. Dr. Johnson, do you belong to any medical societies?

A. I belong to the American Dental Association and all its component societies.

Q. Do you practice your profession in any hospital in Illinois?

(Deposition of Dr. Warren R. Johnson.)

A. Yes, I am a member of the staff of the Norwegian American Hospital and instructor in oral pathology at Northwestern University Dental School.

Q. Being instructor in Northwestern Dental School what does that consist of? [73]

A. Well, that involves a day and a half a week clinical and theoretical instruction to the students.

Q. Dr. Johnson, in the practice of your profession have you had occasion to and did you examine and treat Barbara Arramone? A. Yes, sir.

Q. Did you know and were you informed that she was involved in an automobile accident upon August 27, 1953? A. Yes, I was.

Q. Now, Doctor Johnson, can you tell us when the first time was after August 27, 1953, that you saw Barbara Arramone?

A. Yes, October 12, 1953.

Q. At that time did she come to your offices, is that it? A. Yes, sir.

Q. Did you at that time obtain a history from her? A. Yes, sir.

Q. Would you be kind enough to relate the history that you did so obtain?

A. I obtained the history that she was in an automobile accident in California and had lost four teeth, and traumatized others. And then I proceeded with my examination.

Q. Dr. Johnson, did you make a physical examination upon the date you have just testified to?

A. Yes, sir. [74]

(Deposition of Dr. Warren R. Johnson.)

Q. Would you be kind enough to tell us what your findings of that physical examination consisted of?

A. I found that she had lost the upper left cuspid and upper left first bicuspid.

Q. What does that mean in layman's language?

A. The upper left eyetooth and the first tooth in back of the left upper eyetooth.

Q. Please proceed with your answer, Dr. Johnson.

A. And the lower left central and lateral, the lower left front tooth and the tooth just in back of it.

Q. You say those were the four teeth that were missing?

A. They were missing. Also she had cracked the right first bicuspid. I don't know how to put it any more simply. It is the first tooth in back of the eyetooth on that side, and the lower right second bicuspid.

Q. What was the condition of this last tooth that you just mentioned?

A. She had fractured that tooth also.

Q. Would you describe the condition of Barbara's mouth as you saw it upon this date that you have testified to?

A. Well, in addition to the missing teeth and the teeth that were fractured she had soft tissue lesions in the buccal mucosa, that is the inside of the cheek, and the inner aspects of the lips.

Q. What do you mean by lesions, doctor? [75]

A. Well, I imagine where scar tissue had become

(Deposition of Dr. Warren R. Johnson.)

to form; but I mean you could see there was still inflamed areas in the places.

Q. Will you describe to us any further and additional traumatized area or areas if there were such?

A. It was obvious that in addition to the teeth that she had lost that the adjacent teeth were traumatized also, not being fractured, but you could tell there had been a—they were slightly mobile, and that they were evidently traumatized at the time of the accident.

Q. Where were these traumatized areas with reference to the missing teeth you have described?

A. In the anterior, or front portion of the mouth.

Q. Did Barbara complain of suffering and pain?

A. She has sensitive teeth, and the areas where she lost the teeth were sensitive.

Q. What, if anything, did your examination disclose with reference to sensitive areas within the mouth?

A. Well, these teeth that were fractured were very hyperemic and sensitive to trauma, which as teeth that are cracked usually are, and the area where she has lost the teeth has not been completely healed yet. I mean, there was still a bony process of regeneration occurring in those areas.

Q. You have used the expression 'trauma,' and 'traumatized [76] area.' What is meant by those expressions, medically, Dr. Johnson?

A. Well, 'trauma' implies a blow. A traumatic

(Deposition of Dr. Warren R. Johnson.)

njury is an injury that is violent; a violent injury, a traumatic injury.

Q. Did your examination disclose any such injury? A. Yes.

Q. Dr. Johnson, did you take any X-rays of Barbara Arramone upon the occasion that she visited you? A. Not on the first occasion.

Q. When did you take X-rays of Barbara Arramone? A. October 17, 1953.

Q. Do you have those X-rays with you, Dr. Johnson? A. I do.

Q. Now these X-rays were taken by whom?

A. By myself.

Q. Whose equipment did you use?

A. My own.

Q. What kind of equipment do you have?

A. General Electric X-ray machine.

Q. What, if any, steps did you take to identify the X-rays?

A. Well, the X-rays, immediately after they are taken, are put into an envelope, marked by myself, and then developed by myself and mounted on the regular mounts, with [77] the patient's name.

Q. From the steps that you took are you positive, Dr. Johnson, that the X-rays that you now have that purport to be Barbara Arramone's are in truth and in fact the X-rays of Barbara Arramone?

A. I am.

Q. May I see your X-rays, Dr. Johnson?

"May we, Mr. Pause, identify this series of X-

(Deposition of Dr. Warren R. Johnson.)

rays as Plaintiff's Exhibit next in order, and with the identifying mark of J-1 for identification?

"Mr. Pause: Yes."

Mr. Stutsman: I believe they are in the deposition.

Mr. Nagel: May we have these——

The Court: This envelope and the X-rays contained will be marked Plaintiff's Exhibit 42——

Mr. Nagel: Thank you, your Honor.

The Court: ——for the plaintiff Arramone.

(The envelope and the X-rays referred to were marked Plaintiff's Exhibit No. 42.—Arramone.)

(The reading of the deposition was continued with Mr. Nagel reading the questions and Mr. Stutsman the answers:)

"Q. There are in this document fourteen X-rays?

A. There may be two others in the envelope, bite wing films. Yes, two other bite wings, and one of the—let's see; one of the lower right posterior area.

Q. Now, Dr. Johnson, you have handed me two further and additional X-rays, one card having a single X-ray and another card having two X-rays?

A. Yes.

Q. And these, also, X-rays of Barbara's teeth?

A. They are.

Q. Did you also, in these cases, take the same precautionary measures that you testified to?

A. Yes, sir.

Q. Are you also certain that these X-rays are

(Deposition of Dr. Warren R. Johnson.)

in fact—that they do show the teeth of Barbara Arramone? A. I am.

Q. Do they show the teeth of Barbara Arramone in so far as an X-ray can do that, and their condition upon the date that you have testified these X-rays were taken? A. They do.

Q. This large folder here containing fourteen X-rays we will identify as Plaintiff's J-1 for identification. The card containing two X-rays, upon one card we will mark Plaintiff's J-2 for identification"——

May we offer J-2 for identification into evidence, your Honor, as Plaintiff's Exhibit next in order?

The Court: Well, why don't we just leave all those in the envelope and mark the large card "42" and the one with the two X-rays on "42-A" and the one with the one X-ray on [79] it "42-B" and they will all be together as one exhibit.

Mr. Nagel: Thank you.

(The X-rays referred to were marked as Plaintiff's Exhibits 42-A and 42-B for the plaintiff Arramone.)

Mr. Fitzwilliam: May the record show and may the jury be instructed at this time, your Honor, that these X-rays were all taken on October 17, 1953?

Mr. Nagel: Whatever the testimony is. I think it was October 17th; I think that is what Doctor Johnson testified to, isn't it?

Mr. Fitzwilliam: Yes, I think so, and they are marked on there.

Mr. Nagel: All right.

(Deposition of Dr. Warren R. Johnson.)

Mr. Stutsman: You left off the last line, "and the third."

Mr. Nagel: (Continuing reading) ——"—and the third and last card containing a single X-ray, we will identify as Plaintiff's J-3 for identification.")

Your Honor, that has now been marked——

The Court: That is marked "42-B."

(The deposition of Dr. Warren R. Johnson was continued with, Mr. Nagel reading the questions and Mr. Stutsman reading the answers.)

"Q. Doctor Johnson, I will hand you Plaintiff's J-1; this is the series of X-rays containing some fourteen X-rays. [80] Would you be kind enough to use this document and explain to us the treatment that you rendered to Barbara Arramone. Please keep in mind that we want to designate which of the particular X-rays we are pointing to when you go into a discourse of this matter.

A. The upper left eyetooth and first bicuspid were replaced by a fixed bridge, using the upper left lateral and the upper left second bicuspid as abutments for them.

Q. Now, Dr. Johnson, you mean, in layman's language, you put in one false tooth?

A. No, we replaced two teeth, using the upper left lateral and upper left second bicuspid present in the mouth as the ends to the bridge. Those teeth had crowns placed on them to hold the bridge into position.

Q. Please proceed, Dr. Johnson.

(Deposition of Dr. Warren R. Johnson.)

A. The lower left central and lower left lateral were replaced by using the lower right central and lower left cuspid as abutments for them. In other words, they had crowns placed upon them. Two pontic, or dummy teeth were joined to these crowns, replacing the missing teeth.

Q. Well, Dr. Johnson, by that you mean, generally speaking, that you have used two teeth as anchors, is that correct? A. That is right.

Q. Please proceed. [81]

A. The upper right first bicuspid which was fractured was replaced with a full—or, covered with a crown.

Q. And the crown was of what?

A. The crown was of gold, with an acrylic or plastic front, and the lower right second bicuspid was replaced in a like manner.

She also had operative restorations placed in five teeth.

Q. What do you mean by that, Dr. Johnson?

A. I mean she had these teeth restored with silver amalgam restorations.

Q. How did you accomplish that, Dr. Johnson?

A. Well, that is removing any chipped corners or carious areas, decayed areas, and restoring the missing tooth structure with silver amalgam.

Q. Doctor, did you find any chipped areas?

A. Yes. However, it was my opinion as a dentist that any carious areas that were present at the time should be restored before any prosthetic replacement was gone into.

(Deposition of Dr. Warren R. Johnson.)

Q. Doctor Johnson, I will ask you this: Did you care for and were you the dentist of Barbara Arramone prior to August 27, 1953? A. I was.

Q. For how long a period of time were you her dentist prior to the occasion she visited you, at which time she [82] complained of the accident?

A. Two years.

Q. Did you have in your records anything to show the condition of Barbara's teeth prior to the time she complained of having been in an accident?

A. Yes, I did.

Q. Now, with reference to the four teeth that were missing, can you tell us what the condition of those four teeth were? A. Normal teeth.

Q. The four teeth that you have told us about that were missing, and concerning which we have two separate bridges, that is correct, is it?

A. Yes.

Q. Dr. Johnson, how long prior to the date of the accident was it that you saw Barbara Arramone? Do your records disclose that? If they do not, what is your best judgment as to what that was?

A. Eight months.

Q. On that occasion, will you describe the condition of her teeth?

A. The condition of her teeth at that time were good and normal in so far as I was able to judge. I mean, she had finished her treatment planned at that time.

Q. Dr. Johnson, the X-rays that you have taken and that [83] are introduced into evidence here, do

(Deposition of Dr. Warren R. Johnson.)

hey show any damage to soft tissue? A. No.

Q. Dr. Johnson, from your professional experi-nce, and in your professional opinion, what, if any, ffect did the injury that Barbara sustained to her nouth have upon her bite?

A. She lost a great deal of her chewing and iting efficiency as a result of the loss of those teeth. Now, when they were restored she regained a great eal of that chewing and biting efficiency but not ne hundred per cent of it, not complete.

Q. How important is bite, in dentistry, Dr. ohnson?

A. Well, bite, of course, determines a number f things. It determines the efficiency with which ou masticate your food, it determines to a slight xtent the contour of the face.

Q. Dr. Johnson, what, if any, effect did the rauma have upon the remaining teeth in Barbara's nouth?

A. These teeth in the X-ray did not show any athology about the ends of their roots as a result f trauma at that time. However, they were given vitality test and shown to be vital, but were ob-erved by me frequently when she came in, while ne was having her other treatment performed. [84]

Q. How many traumatized teeth did you find in Barbara's mouth?

A. I would say two or three teeth on either side of ne major traumatic area where the teeth were lost.

Q. Is a traumatized tooth any different from a ormal tooth, Doctor? A. Yes.

(Deposition of Dr. Warren R. Johnson.)

Q. How, and in what regard, were the traumatized teeth of Barbara Arramone any different from the normal teeth?

A. Assuming that these traumatized teeth were vital which we established, they were nevertheless, hyperemic.

Q. By that you mean what, Doctor?

A. By that I mean there was a greater flow of blood through these teeth as a result of the traumatic injury making them more sensitive and irritable at that time.

Q. With reference to length of use of teeth, Doctor, what, if any, effect did trauma in Barbara's case have in that regard?

A. Would you tell me if you mean the teeth that were lost or these other natural teeth?

Q. The teeth that you have described as being the remaining traumatized teeth?

A. These traumatized teeth are probably now beyond the stage of any further pathology occurring.

Q. Do your records disclose upon how many occasions you [85] saw Barbara, in treating her?

A. Forty-one times.

Q. Was the first visit upon the occasion you have testified? A. On October 12th, yes, sir.

Q. And the visits took place from that first visit until your hearing here today, is that correct?

A. That is right.

Q. Dr. Johnson, what charges have you made to date for treating Barbara? A. $462.00.

(Deposition of Dr. Warren R. Johnson.)

Q. Are those charges, in your professional opinion, reasonable? A. Yes.

Q. Doctor, you have testified in doing restoration work for Barbara here, that you, first of all, have inserted two bridges. Is that correct?

A. Two fixed bridges.

Q. Two fixed bridges. Now what is your best judgment as to the life of each of these bridges, considering the age of Barbara, the condition of her mouth, and the work you did in fixing these bridges? A. Ten to twenty years.

Q. And assuming for the sake of argument, Dr. Johnson, that you have to, yourself, replace those bridges with new [86] and other bridges within that period what, in your opinion, would be the reasonable cost of such work? A. $350.00.

Q. That is for both bridges, is that correct?

A. That is correct.

Q. Now, Dr. Johnson, you have also testified that you placed two crowns upon two further and additional teeth, is that correct?

A. That is right.

Q. Now, do you have an opinion, predicated upon medical certainty as to the probable life of the crowns of those two teeth?

A. Ten to twenty years.

Q. And in your opinion, Dr. Johnson, what will be the cost of replacing those crowns?

A. $120.00 for both.

Q. Now, you have given us your opinion that the life of these bridges would be from ten to twenty

(Deposition of Dr. Warren R. Johnson.)

years. Is that opinion based upon reasonable medical certainty?

A. That opinion is based primarily upon averages which are very difficult to determine in cases like that. Some bridges last forty years, some last seven years. It is very difficult to say how long a bridge will last because there are so many other complicating factors that can influence its life. [87]

Q. By the way, that estimate of $120.00 for the replacement of the crowns, is that estimate, in your opinion, reasonable? A. Yes, sir.

Q. Well, Dr. Johnson, how and in what regard are Barbara's teeth, that you have testified to, that you worked upon, any different from normal teeth?

A. Bridges? Are you referring specifically to the bridges?

Q. I am referring particularly to the teeth that you used to anchor the bridges, and then the capped teeth, and then later on I will ask you about the traumatized teeth.

A. These teeth supporting the bridges and the teeth with the crowns on them had to necessarily be ground down or reduced in size in order to accommodate the crown that covered them.

Q. And what did you have to do to the teeth that you capped?

A. The same thing. We had to grind down or reduce those teeth in size also.

Q. The grinding that you have just described. What effect does that have upon the life's expectancy of a tooth?

(Deposition of Dr. Warren R. Johnson.)

A. Again, a difficult question to answer, but certainly reducing the tooth or crowning the tooth doesn't do anything to prolong the life of the tooth, per se. It is only done [88] when necessary in order to replace other teeth, or when that particular tooth is injured.

Q. Well, does it shorten the life span of the tooth? A. I would have to say yes.

Q. Dr. Johnson, would you describe to us what, if anything, you did with reference to the bite, concerning which you have already given us some testimony?

A. The bite was restored as closely as is mechanically possible with the crowns on the abutment teeth and the dummy teeth or pontic teeth, that were used to replace the missing teeth.

Q. Well, as a physical thing what did you do to restore the bite?

A. Inserted these two fixed bridges and two crowns that restored the bite of the patient.

Q. Did you do anything further?

A. No, other than make sure that the bite of the bridges and the crowns was as nearly correct as possible.

"I have no further questions of Dr. Johnson, Mr. Pause."

Cross Examination

(The cross examination was read as follows, Mr. Fitzwilliam reading the questions and Mr. Stutsman the answers.)

"Q. Doctor, did you bring your office card with

(Deposition of Dr. Warren R. Johnson.)

you today in connection with giving testimony in this case? [89]

A. It isn't truly an office card. There is an examination sheet here with Barbara's name and telephone number on it.

Q. Does that card contain all the information with reference to Barbara Arramone?

A. No.

Q. You have a regular office card, a hard card, that you keep in your index in reference to this patient, is that correct?

A. A hard card, an ordinary invoice, regular invoice sheets, yes, sir.

Q. You referred to a yellow sheet of paper in reference to giving testimony here today, is that correct? A. Yes, sir.

Q. And that record that you have in your hand is the one that you referred to. Might I look at it?

A. Yes, sir.

Q. This record does not disclose the number of visits, professional visits that were made by Barbara Arramone, does it? A. No, sir.

Q. So that when you say you attended and treated her forty-one different times you are relying entirely on your memory? A. No, sir. [90]

Q. Well, you did not bring your card with you, did you, Doctor, in so far as your professional attendance? A. No.

Q. How old are you, Doctor?

A. I am twenty-nine years old.

(Deposition of Dr. Warren R. Johnson.)

Q. And you have been practicing dentistry since 1951? Is that right? A. That is correct.

Q. And when you first attended and treated Barbara Arramone you had been practicing approximately two years, is that right?

A. In so far as this accident is concerned, I saw her in my first year of practice as a regular patient.

Q. You have a degree of D.D.S., rather than an M.D., or a degree for an oral surgeon, is that right?

A. That is right.

Q. You are not an oral surgeon?

A. No, sir.

Q. Nor are you an orthodontist?

A. No, sir.

Q. Is that correct? A. That is right.

Q. There was one tooth missing, the eyetooth in the upper jaw, is that correct?

A. Two teeth, the eyetooth and——

Q. Two teeth or one? [91] A. Two.

Q. I see. And those were replaced within what period of time after you saw Barbara Arramone for the first time?

A. The upper bridge was replaced in two months.

Q. And the lower bridge was——

A. Within another two months.

Q. That is a common occurrence, to put in bridgework in a patient's mouth, isn't that true, doctor? A. That is right.

Q. You do a lot of that, I take it, is that correct? A. Yes.

(Deposition of Dr. Warren R. Johnson.)

Q. The function of placing bridgework, or putting in a pontic tooth, is to preserve the contour of the jaw and the contour of the face, is that correct?

A. That is right.

Q. And you have done that, haven't you?

A. Yes.

Q. Doctor, you mentioned that trauma is a violent blow; actually trauma might be induced, in the dental aspects of the anatomy of a patient in this regard by way of grinding of the teeth?

A. That is right.

Q. Isn't that true? A. That is right.

Q. So that trauma might be a very slight——

A. Its impact might be slight, but 'trauma' as used, [92] the word as understood today, involves a severe irritation, or the result of a severe irritation.

Q. Well, doctor, if I put my fingers on my teeth, that is trauma, isn't that true?

A. Well, that is a matter of degree, and I wouldn't discuss degree with you.

Q. Yes, sure. In regard to these X-ray films which have been marked as Plaintiff's Exhibit J-1 for identification, more particularly in the bicuspid, the upper molar and lower molar areas, there is considerable amalgam replacement in these teeth, and I refer this exhibit to you for refreshing your recollection? A. Yes."

Mr. Fitzwilliam: May I have that exhibit, the one you are referring to I think is now marked 42?

(Continuing reading) "Q. In reference to the bicuspid area there is an amalgam filling with a

Deposition of Dr. Warren R. Johnson.)

erve root filling, as well, in the case of Barbara rramone, is that correct?

A. That is correct.

Q. And did you do that nerve filling as well as acing that amalgam on the bicuspid?

A. I did.

Q. Barbara Arramone had been a patient of urs for approximately fourteen months immedi-ely after you entered into the practice or the pro-ssion of dentistry, is [93] that right?

A. That is right.

Q. Had she been continuously a patient for a riod of about fourteen months in order to accom-ish all of the amalgam work that was done, and e filling that is demonstrated in plaintiff's Exhibit 1 for identification?

A. Well, I didn't place all those restorations. I d quite a few, but I didn't place them all.

Q. In reference to the two central incisors of rbara Arramone, was there a separation between e two central incisors before the happening of this currence? Can you recall and refresh your recol-tion from looking at these dental X-rays?

A. I would say it was a slight degree of separa-on.

Q. All right. Might I look at that again, please? ou completed the replacement of the crowns thin a period of about three months after she st saw you, is that correct? A. Yes.

Q. You mentioned something about a carious

(Deposition of Dr. Warren R. Johnson.)

condition existent in the mouth of Barbara Arramone when you first saw her in October of 1953?

A. Yes.

Q. Now that carious condition is known in layman's language as cavities, isn't that true? [94]

A. That is right.

Q. And the cavities that you speak of in her teeth, of course, were not caused by trauma; that is entirely a systemic condition that arises, depending upon the condition of the patient, is that true?

A. That is true.

Q. One patient might have a predisposition toward having carious teeth or cavities in the teeth whereas another will not? A. That is true.

Q. In the case of Barbara Arramone was there extensive evidence of caries, as I recall your testimony in chief, is that correct?

A. She had, I think, five carious lesions, or five cavities.

Q. And the five cavities that you observed were in the bicuspid areas, is that correct?

A. And the molar areas, yes, sir.

Q. Did she have extensive evidence of cavities and caries when you first attended and treated her upon your setting up your practice as a dentist?

A. She had perhaps slightly a few more cavities than the average adolescent would have.

Q. No extraction work was carried out at all, was there, Doctor? [95]

A. In regards to this case?

Q. Yes. A. Not by me.

(Deposition of Dr. Warren R. Johnson.)

Q. And with the bridgework that you have done, ou have got a good result, is that correct, Doctor, nd she still has those bridges?

A. As good as we can hope for, yes.

Q. And the contour of her face and by reason f the fact that you have placed the two bridges, onsisting of two teeth in the upper, and two in ie lower, keeps the regular symmetry and form of he face?

A. As far as the dental arch is concerned, the ymmetry has been restored. As far as the facial utline is concerned, I am not in a position to say.

Q. You are not a plastic surgeon?

A. That is right.

Q. After having completed the replacement of he pontic teeth, thereafter you carried out the ork in connection with the repair of the cavities, s that correct? A. No, sir.

Q. You allowed the cavities to remain, is that hat you mean?

A. No, sir. I repaired the cavities before I re-laced the missing teeth. [96]

Q. And you completed the repair about three ionths after the happening of her coming to see ou? A. You mean the total case?

Q. Yes.

A. The case was completed in early April.

Q. Of 1954, is that right? A. That is right.

Q. The completion of the crowns came about in bout December of 1953, is that correct?

A. The cavities were done first. They were prob-

(Deposition of Dr. Warren R. Johnson.)

ably completed in a month; one bridge was completed in possibly another month, and then the next bridge was completed and then the crowns were constructed.

Q. Doctor, in relation to the bicuspid area that is demonstrated on Plaintiff's Exhibit J-1 for identification, and I refer you to the bicuspid area as demonstrated by the two X-ray films, isn't it true that the teeth as demonstrated therein on October 17, 1953, have a tendency to be somewhat malformed, in that they are at angles rather than in a straight position? Will you refer to that?

A. You see, in taking dental X-rays there is a certain amount of necessary distortion. In taking these pictures, due to the angulation of your X-ray machine and the placement of the film and the curvature of the arch which you will notice in this particular film, the bicuspid looks quite [97] angular.

Q. And slanted?

A. And the tooth in the film, in front of that, looks much more upright. And that is a common occurrence in dental X-ray films.

Q. Doctor, isn't there exhibited in the bicuspid area on both of these films a tooth which is known as a wisdom tooth that appears to be impacted as against the bicuspid?

A. There are impacted wisdom teeth in her mouth, yes, sir. She has four of them.

Q. All right, in reference to the impacted wisdom teeth, wouldn't they have a tendency to angu-

(Deposition of Dr. Warren R. Johnson.)

ate the bicuspids in the manner I have described n the question put to you heretofore?

A. A very moot question. Probably has a normal bite, or did have a normal bite.

Q. Please answer the question, if you will.

A. Probably had a normal bite. No, I would iave to answer the question that it wouldn't.

Q. So that would you say, Doctor, that the films is demonstrated in this Plaintiff's Exhibit J-1 for dentification that I have in my hand are somewhat distorted?

A. No, not beyond any reasonable amount of listortion that is customary in any X-ray. That is vhy fourteen pictures are taken, to attempt to get undistorted views [98] of each tooth.

Q. You last saw Barbara in April of 1953 professionally, is that correct? Or, '54; I am sorry.

A. I examined her teeth today, with a mirror.

Q. Yes. But before today you had not seen her between this day and April of 1954, professionally?

A. Yes, professionally.

Q. The answer is yes, you didn't see her?

A. That is right.

Q. And when you examined her in April of 1954 the last time there was no evidence of trauma n the teeth surrounding the area that you have recapped or crowned? A. No visible evidence.

Q. No visible evidence of trauma at all? All right. So all vitality returned to the teeth by that time?

A. At that time, the teeth were normal and vital."

(Deposition of Dr. Warren R. Johnson.)

Redirect Examination

(Questions read by Mr. Nagel and answers read by Mr. Stutsman.)

"Q. Dr. Johnson, do you have an explanation to the question that Mr. Pause asked you with reference to the normalcy of Barbara's bite?

A. Well, by all dental standards, I mean, from a regular test in wax, her bite is normal. Now, how much wisdom teeth will affect a person in later life is a debatable [99] question. Many people go through their whole life with impacted wisdom teeth and have a very normal bite; many people, if undue pressure is put on the adjacent teeth, should have the wisdom teeth removed."

"I have no further questions, Dr. Johnson."

Recross Examination

(Questions read by Mr. Fitzwilliam and answers by Mr. Nagel.)

"Q. Doctor, you produced here today X-ray films that were taken of Barbara Arramone's mouth on or about Oct. 17, 1953? A. That is right.

Q. Did you ever cause to be made X-ray films of Barbara Arramone's mouth after you completed the bridgework that you have described on the two teeth? A. No, sir.

Q. I take it, if you were alarmed by reason of your professional experience and education, in reference to her bite, or any impairment in so far as dental work is concerned, you would have taken X-rays of her teeth after October 17th?

(Deposition of Dr. Warren R. Johnson.)

A. That is right. We usually work on a six-months recall system, where those teeth would probably be X-rayed at that time.

Q. And they were not X-rayed? [100]

A. Not at that time, no, sir. Not recently.

Q. Nor have they been X-rayed since October 7, 1953? A. No.

"That is all."

Mr. Nagel: Your Honor, with the Court's permission, in order that they can better follow these two depositions we would like to introduce first of all these photographs that were——

The Court: They have already been introduced.

Mr. Nagel: I would like to pass them to the jury; I am sorry; as well as these X-rays.

Mr. Stutsman: They can hold them up, I believe.

Mr. Nagel: I think perhaps if I can give these photographs in the order in which they were placed into evidence to the jury, your Honor——

The Court: All right, you may pass them around.

(The exhibits referred to were passed to the jury.)

The Court: Ladies and gentlemen of the jury, we will take a brief recess at this time. You will remember the admonition of the Court heretofore given.

(Recess.)

The Court: The jurors are all present. You may proceed.

Mr. Stutsman: Dr. Bromberg. [101]

DR. WALTER BROMBERG

called as a witness for the Plaintiff Arramone, sworn:

Direct Examination

Mr. Stutsman: Q. Doctor, for the record will you give us your full name, please?

A. Walter Bromberg.

Q. And are you a duly licensed practicing physician and surgeon in the State of California?

A. I am.

Q. Where is your office located, Doctor?

A. It is in Sacramento, at 922-29th Street.

Q. And where do you reside, Doctor?

A. In the City of Sacramento.

Q. Now, Doctor Bromberg, will you please relate the schools you attended and the degrees you earned prior to being licensed as a physician and surgeon in the State of California?

A. Yes. I am a graduate of the State University, College of Medicine of New York City; I graduated therefrom in 1926.

I was subsequently an interne, a medical and surgical interne at the Mt. Sinai Hospital in New York, and then resident neurologist at that institution.

Following that I was a junior psychiatrist at the Manhattan State Hospital on Ward's Island.

And then Junior and later a Senior psychiatrist at the [102] Bellevue Psychiatric Hospital for a period of some eleven years.

Prior to those years I was director of the psychiatric clinic for the Court of General Sessions,

Testimony of Dr. Walter Bromberg.)

nd for five years I was instructor in psychiatry at
ne New York University Medical college, and for
our years assistant professor of psychiatry at the
ew York University College of Medicine.

During that time I was active in various clinics
n New York City, and in 1937 I was qualified as
n accredited neurologist and psychiatrist of the
merican Board of Psychiatry and Neurology.

Following that I came west in the beginning of
Vorld War II and worked for the Army, and
ter entered the Naval Service for a period of four
ears, finishing with the rank of Commander in the
Iedical Corps.

And then established practice in Reno, Nevada,
as consulting neuro psychiatrist at the County
Iospital in Reno and then Clinical Director of the
Iendocino State Hospital of Ukiah, California,
rom which institution I came to Sacramento and
ave been in practice of neurology and psychiatry
nce 1951.

I have lectured at the University of California,
Berkeley, in the spring term of 1949, have been
ctive in Veterans Administration affairs, being
onsultant for outpatient treatment from 1948 to
ne present time, a member of various [103] psy-
hiatric societies, a fellow of the American Psychi-
tric Association, a member of the group for the
dvancement of psychiatry, and have written 50
rticles in various scientific journals, and have writ-
en three books on psychiatry and neurological
roblems.

(Testimony of Dr. Walter Bromberg.)

Q. Doctor, I take it from relating your qualifications that you specialize in some branch of medicine? A. I do.

Q. That is neurology and psychiatry?

A. That is right, sir.

Q. Now, Doctor, will you tell us what neurology is and psychiatry, what difference, if any, there is between those two specialties?

A. Neurology is the study of disorders of the nervous system, which includes the brain, its covering, the spinal cord and the nerves that run from the brain to the spinal cord and various parts of the body. For example, strokes or paralysis or any injuries of the brain would come under neurology.

Psychiatry deals with disorders of the mind and the mental functions, and the emotions and, of course, they overlap, because disturbances of the nerves or the brain would give mental symptoms, and very often mental symptoms give rise to actual nerve disturbances.

So that would cover the whole field of the nervous [104] system.

Q. And many times they refer to a doctor, who specializes, as you do, as a neuro-psychiatrist?

A. That would cover the whole field, neuro-psychiatrist.

Q. Doctor, do I take it also that in listing your qualifications you also are an M.D. or a regular doctor, but you specialize, is that right?

A. Yes, I am an M.D. and do general medical work at times.

Testimony of Dr. Walter Bromberg.)

Q. I see. But you are now restricting your practice to the specialty? A. Yes.

Q. Now, doctor, at what hospital do you practice?

A. At the present time I am on the staff of the Sacramento County Hospital and I am a member elect of the staff of Mercy Hospital, Sacramento.

Q. Now, Doctor, in the practice of your profession did you have occasion to examine and meet Barbara Arramone? A. I did.

Q. When did you first meet her, doctor?

A. I saw her first on the 30th day of March of this year.

Q. And how many times have you met her and talked with her and so forth, examined her?

A. I have seen her on three occasions. I saw her for a period of about five hours on March 30, 1955; I saw her for a period of two hours on April 1955, and I saw her again for a short time today.

Q. Doctor, did you, during the course of the time that you saw her obtain a history from her?

A. I did.

Q. First, doctor, from whom did you obtain the history and from what sources?

A. I talked to the patient, I talked to her mother, her uncle and aunt, I studied the records of the San Joaquin Hospital, the hospital in Stockton, and I studied the depositions of the Dental Surgeon, Dr. Smalley; of Dr. Greeley, the facial surgeon, and I read the reports of these various doctors, and letters.

(Testimony of Dr. Walter Bromberg.)

Q. Doctor, would you relate the history you obtained?

A. Yes. I made a very careful analysis of the girl's entire life, and I will try to put it in serial order.

I ascertained that this patient was born 19 years ago in Chicago, that she was healthy as a child, with the exception of childhood diseases such as measles; that her menstrual life started at the age of 13, that there were no abnormalities therein; that she was not what is ordinarily considered as nervous; she is considered a studious girl, she graduated from high school, she was a non-complaining, friendly type of individual.

I ascertained that she was regarded as a gay, happy child, interested in the usual school and high school activities; that she had girl friends, that she was active in her class, [106] she played basketball and was interested in all the things that girls of of that age could be interested in.

That she was a regular church-goer, that there was no evidence whatsoever of any personality trouble or nervous trouble during her early life.

On August 27, 1953, is was stated that she was injured in a motor car while she was asleep as a passenger on the right side of the car.

The important point from my point of view was the following:

That she was aware only of hearing a crackling of glass; that is, she knew she had fallen asleep and then became aware of the noise of crackling

(Testimony of Dr. Walter Bromberg.)

of glass and had a sinking feeling in her stomach, her head hurt, and was bleeding from the ear, and that she tried to get out and couldn't.

From then on her memory is very vague. She remembers only noises around her, and woke up in a hospital two days later.

At that time she was informed it was the San Joaquin Hospital in Stockton.

At that point she had pain in her right knee and had double vision; everything she saw looked double. Things were foggy, but she became aware of her surroundings about the second day after August 27, 1953.

She then was aware of pain in the left side of the jaw, [107] upper and lower, and a feeling of numbness on the left side of her face.

The stiffness in the knee continued to bother her. She had numbness of the left arm and a constant feeling of dizziness.

She experienced sensations of floating when she was not asleep lying in bed, and a constant thinking of the accident, and a re-experiencing of it; seeming like she was back in it.

A week later, she was transferred to a hospital in Fresno, and after a month returned to her home in Chicago.

Her complaints during this month and the next few months can be put under one head because they ran about the same.

Besides those I mentioned, the history stated that she had many dizzy spells, which increased

(Testimony of Dr. Walter Bromberg.)
upon her return to Chicago. At times she was observed to grope along the wall when she walked.

She complained of double vision. She was extremely nervous, being easily irritated, would fly off the handle, in her mother's words. Was quick to cry, was irritated by noises, slept very fitfully. At times she would moan while sleeping, "Oh, I am away up here." "Well, now, you think I am hurt, but I am not."

Her appetite decreased, she lost eight pounds immediately after the accident, and up to this point has lost 22 pounds, 22 or 24 pounds. [108]

Back in Chicago she returned to school where there was a noticeable slowing up in her studies and reduced participation in social activities in school. She had trouble concentrating, nevertheless they graduated her in February, 1954.

She then got a job with the telephone company and worked from March to August—September 1st of that year.

On the job she was fatigued, she was sleepy at the job, unable to sleep at night. She had constant frontal headaches, was depressed, numbness in the face continued. She was noticed to talk louder than usual. She lost her social personality, wouldn't go out, didn't care to contact her friends as before, had difficulty in concentrating, absent from work a lot, complained of trouble in breathing, and finally, at the end of August her boss asked her to resign because of inefficiency.

Further analysis of her condition, her complaints,

Testimony of Dr. Walter Bromberg.)

hat is, the history revealed that she had been ob-
erved to laugh for no apparent reason, at things
hat were not funny to others. The laughter started
nd stopped suddenly. It was louder than she had
ughed before.

Prior to the accident, as I said before, she was
typical high school girl, made good grades, inter-
sted, and had decided to become a dental nurse.

The history further stated that she was markedly
orgetful. [109]

Recently she made telephone calls to four of her
riends whose exchange number was different than
hat of her own. On each occasion she complained
he numbers were busy, when it was discovered she
ad called her own telephone number.

On one occasion she was described as having left
he house forgetting three objects, her keys, money
nd cleaning fluid. She came back for each object
n turn; that is, she came back for the keys and
orgot the money, came back for the money and
orgot the cleaning fluid.

On many occasions when she has actually a poor
hemory she covers up by being what the mother
escribes as artificially gay, and finally said, "Some-
hing must be the matter with me."

She has been observed to stand moodily for long
eriods of time with her hands over her eyes.

She is irritable with her mother. At times she
ries out about her scars and falls on the bed face
own in anger.

Those who know her describe her as having a dif-

(Testimony of Dr. Walter Bromberg.)
ferent personality than she had before. She is withdrawn in manner.

At times she describes hallucinations. For example, she is quoted as having said, "I hear a bell ringing, mother. Do you hear something?"

She awakens from her sleep and says that lights are glaring at her, she just had been in a bombing raid, at one time, and another time she said that some object came close to her face from a distance far away and she wakes up frightened. [110]

At other times she described a sensation as if a cat was purring on her chest. When she woke up to grab it she found nothing was there.

Her present symptoms can be summarized as follows—they include those I mentioned and those that I got as being present the last few months: The most constant symptom is dizziness associated with severe headaches and dizzy spells as well as blackouts, which take a fraction of a second, but have appeared four or five times in seven months.

The next symptom is that she veers to the right when she walks.

Another symptom is headaches, present every morning, returning in the afternoon—present every morning, and persistent through the afternoon.

Another one is sensitivity to light.

Her eyes burn and tear.

Another symptom is insomnia.

It says other numerous types of disturbances. For example, she goes into a dream-like state which we call hypnogogic, which means half way between

Testimony of Dr. Walter Bromberg.)

eep and awakening. At these times she has the arious experiences I have described, such as hear-g noises, ringing of bells, fear of animals, and actually aware of these things, that is, she hallu-nates them. She thinks they are there, but they re not there.

There is a constant buzzing in the ears. At times ne [111] experiences a bad odor, such as dry blood, bout her, and there is no such thing in her envir-nment.

Further symptoms are that she day-dreams a lot nd forgets what she is doing, cannot concentrate n what she is reading, and loses the thread of the onversation.

A further symptom is the numbness of the left rm, especially after sleeping, and weakness of hat arm.

The nightmares I have described and the forget-ulness have already been described.

She makes odd mistakes, such as when called to he dining table she turns the chair away from he table as if it were facing the table, and dis-overs the mistake and makes a joke about it. At ther times she is not so jocular, she becomes very pset and says, "What is the matter with me, why o I act this way?" And becomes emotionally un-table.

That is essentially the history I obtained.

Q. Now, Doctor, after obtaining the history did ou make a physical examination of Barbara?

A. I did.

(Testimony of Dr. Walter Bromberg.)

Q. Will you relate your findings of that physical examination, please?

A. Physical examination discloses a girl of five feet three quarter inches in height, weighing 94 pounds stripped. The heart and lungs were essentially negative. The teeth showed: Prosthetic—that is, the artificial teeth in the [112] upper and lower left jaw. There were scars on the face, one a three inch scar on the left forehead to the hair line; a second over the bridge of the nose extending on both sides, essentially to the right; a third, a scar about three inches long on the left cheek; two or three smaller scars on the right cheek, and a two inch irregular scar on the chin.

There is also a slight deformity of the left wrist, indicating a fracture of the small bone.

In other respects she was essentially negative, with the exception of the nervous system.

Q. Doctor, did you also at that time perform a detailed neurological examination? A. I did.

Q. Now, will you please relate what those tests consisted of, and your findings in that regard?

A. The neurological examination is an examination of the nervous system as it functions; that is to say, you test the sensations, you test the balance, the muscle power, the reflexes, the coordination of the body in the various extremities; you test the function of the eyes, the nose, the hearing, the sight, the various senses, in other words, in great detail, and it is purported to bring out any disturbances in nervous system function.

Testimony of Dr. Walter Bromberg.)

Q. Now, what were your findings in that regard, Doctor?

A. My first examination, which I did in great detail, the [113] findings were as follows:

When the patient walked she veered constantly to the right when walking with her eyes closed. This was checked several times, and this indicates that the balance mechanism which lies inside the head in bone is out of order, because the patient, even though she wishes to walk straight, veers to the right without wanting to.

The next thing tested was what we call equilibration,—equilibration, which means balance and coordination, and here was a positive Rhomburg test, which simply means that the patient stands with feet together and eyes closed and after a while the patient veers or sways one way or the other.

A further test known as the pastpointing, in which the patient holds her hand in the air and brings it down to a given fixed point, and the arm veers away from the fixed point, and the patient is asked to look again and measure the distance carefully and try to correct it. In spite of the correction the arm wanders off. That is to say, the coordination for a point is disturbed.

This coordination is disturbed in the left hand more than the right, and the left hand swept to the right insensibly, which indicates that the balance of the left upper extremity was disturbed.

I then went on to examine the muscle power. The patient is right handed, of course, and therefore

(Testimony of Dr. Walter Bromberg.)
we expect a stronger [114] grip on the right than on the left, but in spite of that there was a definite weakness of the muscle groups of the forearm, the group that bring the hand up on the left side, in addition to the difference in strength between left and right in any right handed person.

There is also weakness in this muscle that rotates the head to the left.

I took each muscle group, I may explain, and tried to test each of the many, many muscle groups in the body to test which particular group was out of order. I am only giving you the positive findings now.

There is then a weakness in the muscle that rotates the head to the left, as well as the forearm on the left side. At the same time there seemed to be a decrease of muscle body, that is to say some possible atrophy in the left forearm as compared to the right.

We then examined the reflexes, which is the response to tapping the tendons in the various parts of the body. All of these reflexes were over-active, but the reflexes on the right side were more active than those on the left.

We took those at the ankle, at the knee, above the knee, on this side of the arm, this side, and behind the arm, at the elbow and at the joint. (Demonstrating).

The findings indicate that there is increased reflex activity in the right side of the body compared to the left [115] and a sign which we call pulmus,

(Testimony of Dr. Walter Bromberg.)

which means that when you tap the reflexes it doesn't stop, it continues indefinitely. This I found in the right foot.

The examination then proceeds to what we call abnormal reflexes; that is, the so-called Babinski's test and the Hoffmann's test. These were negative.

We then proceeded to test the sensation to pinprick, pain, to touch, to vibration, and to heat and cold throughout the body. We find that the sensation is normal throughout the body with the exception of the head, except the left forearm, which had a band of decreased sensitivity to various stimulations.

The examination proceeds then to test the nerves of the head, which are the most important part.

First, the scars all show sensitivity to pressure, the scars I described on the face. Secondly, the olfactory nerve, which is the nerve of smell, showed some disturbance.

The patient, for example, smelled stale tobacco in a pipe as peppermint. That was a pretty obvious smell. So that I found that the nerves which bring the smell sensation back to the brain were somewhat disturbed.

Then we examined the ocular nerve, the nerve of the eye itself, and here we found no particular disturbance in the actual muscles that move the eye about.

The double vision which was described originally would [116] involve the eye muscles because the eyes are supposed to move synchronously, but

(Testimony of Dr. Walter Bromberg.)
there is no disturbance at this time which points to double vision.

Then we examined the sensations of the face, which is carried by a different nerve than those of the sensations of the skin of the body, and here I found a definite anesthesia, decreased sensation of the face, starting at the midline extending right to the eyebrow, covering the nose, upper lip, lower lip and face as far as the ear.

At the same time the sensation over the scars of the forehead were much more acute, and also the muscle on the left side is irritable, what we call myopathic irritability, namely, that we touch the nerve, it flicks of its own—touch the muscle, I mean —when you touch other muscles they don't flick that way.

We then go on to test the muscles that cause the face to smile and make various movements, and here we find that there is a paralysis in the muscles of the face on the left side from the eyes down, so that when the face opens it pulls back the teeth, the right side works and pulls the face out of symmetry. At the same time it twitches the muscles of that side in what we call a contracture, that is a tightening up of that muscle, because the nerve is fastened in that muscle.

I then examined the ears and the balance I told you about, [117] and the muscles of the tongue, of the throat, the various reflexes in the throat and the eyes and cheek.

And then three days later I carefully checked all

(Testimony of Dr. Walter Bromberg.)

the responses I got the first time on the second test, and that would conclude the neurological examination.

Q. Doctor, relative to these neurological findings, did you have an electroencephalogram taken of Barbara Arramone?

A. Yes; I then suggested that a brain wave test be made and that was carried out.

Q. What doctor took care of that, Doctor?

A. Dr. Howard Petzold in the Sutter Hospital in the city.

Q. And did you have the findings of that available to you?

A. I have here the report from Dr. Petzold from the Sutter Hospital.

Q. What was that report relative to the findings, whether they were positive or negative?

Mr. Fitzwilliam: If your Honor please, I suggest that that is immaterial. Dr. Petzold will be here, I assure you.

Mr. Stutsman: That is fine, if Dr. Petzold will be here.

Mr. Fitzwilliam: It is my understanding he will.

The Court: Well, at any event one doctor cannot testify for another any more than a lay person can testify for another. [118]

Q. Doctor, first I want to ask you about the paralysis of the face that you described, relative to the period of time that has elapsed since the lacerations, do you have an opinion based upon reason-

(Testimony of Dr. Walter Bromberg.)

able medical certainty as to whether that condition is temporary or permanent?

A. In my opinion—I have an opinion.

Q. What is your opinion, doctor?

A. My opinion is that it is a permanent paralysis of the left facial muscle.

Q. Doctor, you are familiar, are you not, with the mechanism of the injury that caused the lacerations and wounds that you described?

A. Yes, I got a detailed account of the actual injury beyond what I—that is, the actual mechanism of the injury.

Q. Will you relate that?

A. Well, briefly that she was in the right side of a car, on the passenger side of a car; that the car was struck on that side; that the point of impact was the door itself, and just a little bit ahead of it, and that her head struck the window, which was of unbreakable glass, nevertheless her head went through it, and that there was a second impact which apparently jammed the door post, a part of the door against her head the second time. The whole thing happened while the cars were going at fast speed, and the mechanism—it [119] was a direct blow, in other words.

Q. Doctor, considering your findings, considering the mechanism of the injury, do you have an opinion based upon reasonable medical certainty as to whether these abnormal findings that you have related in your neurological examination are related to the trauma involved?

(Testimony of Dr. Walter Bromberg.)

A. Yes, according to everything I have heard, and what I have seen in this patient, I have an opinion that they are the result of the trauma described.

Q. Doctor, following this neurological examination then did you make a detailed and studied psychiatric examination of Barbara? A. I did.

Q. Now, will you relate what that consisted of, doctor, and your findings in that regard?

A. Well, a mental examination as opposed to a neurological one, has to do with the mind; in other words, the emotions, the reactions to questions, and our observation.

The patient was cooperative, that is to say she wished to answer. There was no hostility and no indication to my mind of faking or malingering.

The essential findings were that there was definitely—I will first discuss the emotional reactions: The emotional instability which was described I observed. At one point, for example, I asked her a question about [120] what doctors had seen her, and she suddenly broke out into a prolonged and, you might say, unnecessary crying. That is to say, the question was not such that would elicit a responsive crying. And she was unable to stop for a few minutes. When I finally got her to stop she stated that the doctor had said that her scars were not so bad.

In other words, she has what I consider an emotional instability.

The second emotional point is that there is a cer-

(Testimony of Dr. Walter Bromberg.)
tain flatness, as we call it, which one perceives by experience underneath a certain amount of gaiety. In other words, she didn't have the normal reaction that a girl of her age, education and background should have on an emotional level.

So much for the emotions.

Now on the mental or intellectual side, it was obvious from my tests that she is a girl of average intelligence, perhaps a little higher. However, on a very detailed test of memory it was clear that she had definite memory defects.

I will give you an example: I asked her, for example, to count from 20 to 1 backwards. She then counted 21, 20, 19 and so on.

I asked her again, "Count from 40 to 20 backwards by twos." She counted 40, 48, 46, 44, 42, and suddenly laughed and said, "Oh, no," and she came back to 40. [121]

I asked her, for example, to count from 51 backwards by threes.

She answered, "51, 49, 47, 45," rather than "51, 48." I then asked her to count backwards from 100 by threes. Again she answered, "100, 97, 94, 91 and 89."

I repeated many times what is known as an aphasia test to see whether a person can carry a series of events in their minds correctly forward or backward, to see whether they have what we call mental attention, whether they can hold an idea long enough to remember, for example, that three from 51 is 48 and not forty-nine.

Testimony of Dr. Walter Bromberg.)

These various aphasic tests indicate that her memory is poor because she has not the ability to hold in to an idea even for a few seconds.

This comes out—in the history I was given it comes out also at the examination at odd times as well as in the regular way. For example, there is one of the tests which says, "Give some"—"Give some maxims, slogans, such as, 'One rotten apple will spoil the barrel,' something of that nature," and she add words, such as "One rotten apple will spoil the pot."

Then you say, "Do you mean 'barrel'?" "Oh yes, I mean barrel."

What I am trying to bring out is, the observations which relate to her so-called difficulty in retention of ideas [122] and memories, so-called aphasia, is hard to reproduce when I tell you about it but is gotten from observation by giving you various and different ideas and words and measuring her responses thereto.

Another test is to see if she can differentiate right from left, and you give the patient complicated orders, such as "Stand up, go to the mirror, touch the right side of the mirror with your left hand, turn twice to the left and return to the chair."

You start orders simply and you gradually increase them to more complex orders.

In that you find that she is unable to distinguish left from right when the orders are complicated enough.

Of course, you also standardize against what a

(Testimony of Dr. Walter Bromberg.)

girl should know of her age, and you don't give her impossible questions.

Also you check the reading and check her perception of the spoken word, and various other tests.

The net result of all this is that I found that she has a difficulty in what we call word symbol appreciation. That is to say, the word which means a certain thing, the word "paper" meaning this, is not retained in her mind long enough for her to use and repeat if she wants to use that in a sentence, and that her laughing, which was described as absurd, was to cover up this inability to [123] remember what she wants to remember.

In other words, she has a condition called aphasia, which we consider, have knowledge of, as an indication of injury to a certain part of the brain tissue. That would be the essence of the mental examination.

Q. Doctor, I notice that you related in your history about headaches, dizziness, blackouts, and irritability and nervousness. Does that have any medical significance to you, Doctor?

A. Yes, indeed.

Q. What were your findings in that regard, what do you attribute those to, those symptoms?

A. As I recall you said blackouts, dizziness, headache and——

Q. Nervousness, irritability, fatigue-ability, and so forth.

A. Well, the whole picture is very clearly that

(Testimony of Dr. Walter Bromberg.)

of a post-concussion syndrome, which means a condition resulting from concussion of the brain.

Q. Now, Doctor, is the brain concussion syndrome you have related, is that on a mental basis or organic?

A. That is due to actual bruises of the brain, ostling of the brain around inside the skull.

Q. And do you have any opinion as to whether she sustained any brain disturbance?

A. Yes, I found that she evidences of a shaking up of the brain inside the skull.

Q. Now, doctor, relative to the psychiatric aspect, what is [124] psychic trauma?

A. Psychic trauma would be a mental shock as opposed to a physical shock.

Q. What effect does that have upon a person, doctor?

A. Well, mental shocks vary from loss of a loved one to a minor fight with somebody, witnessing an accident, being in an accident; mental shock is anything which disturbs your mental equilibrium.

Q. Now, doctor, would the fact that a young lady 17 years of age having permanent disfiguring scars, would that have any effect upon her emotional behavior?

A. I should say it would, yes.

Q. And would you explain to us how that would affect a person, doctor, on a medical basis?

A. Well, obviously from an ordinary common sense point of view, a young girl at 19 expects to be married and live a full life, is immediately dis-

(Testimony of Dr. Walter Bromberg.)
turbed by facial disfigurement, because of the high value which is placed upon beauty and good looks in our society. And besides that it has a particular effect on a person's feeling of self-esteem. A person who has a disfigurement, a person born with a disfigurement, of course, has a low self-esteem, they are embarrassed, ashamed, they hide themselves, and so on.

A person who otherwise was attractive, who develops a disfigurement of the face would be all the more injured in [125] what we call their self-esteem value, develop inferiority feelings, phobias, fears, and that would be the psychic trauma effect on this particular type of case.

Q. In your examination and in your observations of Barbara has that had any effect on her?

A. I would say that a lot of the instability that was discussed, and some of which I witnessed, especially in relation to what the ordinary medical conversation was, would be the result of such a psychic shock.

Q. Is there any way that you or other doctors can assist her in meeting this problem?

A. Well, we have to retrain her personality to accept the defects, that would be the way to say it, and that is the process called "psycho-therapy", psychological treatment.

Q. Do you believe or feel, based upon reasonable medical certainty, that psycho-therapy is indicated for Barbara?

A. I would say definitely it would be helpful.

(Testimony of Dr. Walter Bromberg.)

Q. And over what period of time do you think hat should be applied, doctor?

A. Well, she is 19 now. I think that would be ome five or ten years before she was really stabil-zed and able to accept this as part of her life, so would think you would have to see her for a pe-iod of five years, or ten years.

Q. Do you believe that it could be entirely erased r assisted or how? To what extent do you think he can be [126] helped?

A. It is hard to say. It depends on what score he puts on her looks, and whether her personality s balanced enough to take a blow like that early n life. It is just as you see with veterans who have ost a limb in battle, they never lose the scar, the nental scar, but sometimes they adjust better than thers, depending on the basic personality. You ever can tell until you work with them over a eriod of time.

Q. Doctor, would the fact that a young lady at 7 had received such injuries make a difference rom one older, or would it be about the same at ifferent ages?

A. I would think it would be much more severe n a girl of 17 or 18.

Q. Is there a difference in the effect on the nervous system of a younger person and an older erson?

A. The difference is the effect on the mental pparatus, the psychological effect.

Q. Do you have any opinion based upon rea-

(Testimony of Dr. Walter Bromberg.)

sonable medical certainty as to whether there will be any permanent psychological or emotional defects from this disfigurement?

A. I would say without doubt there will be emotional defects of a traumatic nature due to these disfigurements.

Q. You mean by that for the rest of her life, Doctor?

A. Yes, or certainly until she is of much more mature age than now. [127]

Q. Doctor, do you have any estimate as to what you would estimate psycho-therapy would cost over this period of time that you have indicated?

A. I would think she should be seen at least once a month by some competent psychiatrist, and that is a matter of five or six hundred dollars over a period of eight to ten years.

Q. Five or six hundred dollars. Doctor, is there anything else you can tell us from your findings and all your discussion here today as to what Barbara's future is, in other words, relative to all these factors that you have related?

A. Well, I will put it this way, if I may: She has a psychic trauma, the mental shock we have discussed; she has a paralysis of the facial muscles which is permanent; she has a probable injury to the brain, inside the brain, which accounts for the reflex changes, which may be stationary or which may progress. She has this concussion syndrome with blackout spells and personality deterioration, which will not recede, which may be stationary or

Testimony of Dr. Walter Bromberg.)

ay progress and get worse; and, of course, the ars.

Mr. Stutsman: Thank you kindly, doctor. You ay cross examine.

Cross Examination

y Mr. Fitzwilliam:

Q. I just have a few questions, Dr. Bromberg. he main basis of your psychiatric diagnosis is istory in this case, [128] isn't it?

A. No, sir, I wouldn't say that. I would say——

Q. Well, Doctor, you never saw Barbara Arra- one until last Thursday, as I get it?

A. That is true.

Q. Is that right? A. That is true.

Q. And did you know that although it has been ineteen months since the accident she had never een a psychiatrist until she saw you?

A. I believe I read a report from a neurologist n Chicago, a neuro-psychiatrist in that interven- ng——

Q. Well, it is my understanding that Dr. Voss— n't it?

Mr. Nagel: There are two.

Mr. Fitzwilliam: Q. That he was a neurologist; ut at any rate, doctor, you certainly were advised, eren't you, that at the most she has been merely xamined back there at Chicago by a neurologist or erhaps on one occasion a psychiatrist, I don't now. A. Yes, but if I may add——

(Testimony of Dr. Walter Bromberg.)

Q. Well, can you answer the question? Were you advised of that?

Mr. Stutsman: He said yes, counsel.

Mr. Fitzwilliam: Oh, pardon me.

A. But I would like to qualify that, namely, that in [129] reading Dr. Smalley's long report of a year or so contact I find that he handled the psychiatrict aspects of it as I judged from his deposition.

Q. The family doctor that delivered her?

A. Yes.

Q. A psychiatrist?

A. He handled the psychiatric aspect of it.

Q. All right. At any rate, doctor, you knew you weren't going to treat her, you knew she lives in Chicago?

A. I know she lives in Chicago, yes.

Q. Yes. And you knew you weren't going to treat her?

A. I don't know, she walked in my office. I have just now been examining her.

Q. All right, doctor, who referred her to you?

A. Mr. Stutsman.

Q. Yes. She wasn't referred to you by a doctor, she was referred to you by her lawyer?

A. That is true.

Q. All right. And you certainly realized, doctor, didn't you, that the sole purpose that Mr. Stutsman had engaged you in this case was as a witness, not to treat her? That is true, you knew that, didn't you?

(Testimony of Dr. Walter Bromberg.)

A. No, the whole purpose was to evaluate the ase after examining her and conferring with him.

Q. And you understood that no such evaluation s yours had [130] ever been made in these nine- een months preceding her visit to you?

A. I didn't know, but I wasn't concerned. I just id my job.

Q. All right. Now then, you obtained the his- ory, did you, with the careful noting of all of the istory concerning her complaints in the same care- ul manner that you did the history about what art of her automobile was struck and all that?

A. Well, I may say I try to use care in every- hing I do.

Q. Yes. All right. Tell me, doctor, you have een here since 1951. Have you ever been hired by n attorney representing a plaintiff contending psy- hiatric changes where you haven't been able to nd some psychiatric changes to testify to?

Mr. Stutsman: May I have that question read, our Honor?

(Record read.)

Mr. Stutsman: If the Court please, we object o that question on the ground it is incompetent, rrelevant and immaterial, and does not tend to rove or disprove any issue in this case, and I elieve it somewhat insinuates——

The Court: The objection will be overruled.

A. Yes, the answer is yes, I have had cases vhere there were no psychiatric findings.

Mr. Fitzwilliam: Q. People are contending that

(Testimony of Dr. Walter Bromberg.)

there are though, at any rate, and you find that there are not, [131] is that right?

A. I have cases which show normal mental functions, I have cases which show disturbed mental functions. Those that are normal the answer will be that they have no psychiatric findings.

Q. Well, we have met many times in court before, haven't we, doctor; you and I?

A. It has been a pleasure, yes.

Q. As far as Miss Arramone's age is concerned, doctor, at nineteen, the average girl has not yet matured to the state where she is developed into a definite set personality, has she?

A. No, I can't agree with that. I would say that girls have—and boys, too—have a personality that is quite set at 17, 16 or 17.

Q. Well, what I am getting at is this, doctor, that as you state, as she gets more mature, you say that she may overcome this emotional instability that you have told us about?

A. She may adjust herself to her injuries better than she has now.

Q. Yes. All right. Now then, this instability, as you say, can be caused by the scars, her mental outlook as to that would certainly improve if those scars were improved in the future contemplated plastic work, wouldn't it?

A. Well, there are two problems there: One is that the [132] original injury, that psychic trauma, can't be wiped out, and second is the continued

(Testimony of Dr. Walter Bromberg.)

resence of scars. If they were improved it might ave some effect, yes.

Q. Now, have you looked up the San Joaquin ounty Hospital record?

A. Have I looked at it?

Q. Yes. A. Yes, I have.

Q. And you have related that you were advised iat there were two days after the accident before liss Arramone was conscious, is that right? That s the history you obtained?

A. I said she had no memory.

Mr. Stutsman: Just a moment. Have you finshed your answer, Doctor?

A. No. I said she had no memory for a matter f two days after the original injury, not a clear iemory.

Mr. Fitzwilliam: Q. Do you recall seeing on he hospital record on August 28th, "Seems to be lert"? Do you recall seeing that?

A. I recall some other entries too. I wonder if could look——

Mr. Fitzwilliam: Well, Doctor—may I request he witness to please answer my questions?

The Court: Yes, Doctor, just answer the quesions and we will get along a little faster. [133]

The Witness: Your Honor, may I refresh my iemory by reading the record.

The Court: Certainly. If you want to see the ecord you may.

A. (After referring to document.) Yes, "Seems o be alert."

(Testimony of Dr. Walter Bromberg.)

Mr. Fitzwilliam: Q. Do you recall on the same date a notation on the record, "Visited by her uncle. Did not seem to upset her."

A. Yes.

Q. All right. Now, as far as any brain damage is concerned, Doctor, such evidence as that on the day immediately following this accident would be considered as a good sign, wouldn't it?

A. Well, I note that a nurse wrote that, and I don't know whether it was a nurse or nurse's aid or how good her observation was.

Mr. Fitzwilliam: Well, if your Honor please, this hospital record has been introduced in evidence by the Plaintiff, and I think I am entitled to ask that question without the witness——

The Court: All right, doctor.

Mr. Fitzwilliam: Q. I am asking you if such evidence would not be a good sign as to the probable absence of any great brain damage?

A. I would have to answer that it depends upon the reliability [134] of the observer, so I will have to really give you a qualified answer.

Q. The notations on the record, doctor, the following day marked "August 29th", "appears to be quite alert, very cooperative, no complaints other than penicillin shots," wouldn't such a circumstance, doctor, if it existed, be a good symptom or a good sign to you as a doctor as regards any possible brain damage?

A. Well, no, because sometimes head cases are unusually cheerful, more cheerful than they should

(Testimony of Dr. Walter Bromberg.)

be under the circumstances, have what is known as Euphoria, which is a definite condition of abnormal cheerfulness.

Q. You think those things would be a bad sign?

A. Abnormal cheerfulness, yes.

Q. Well, no. "Appears to be quite alert, very cooperative, no complaints, other than penicillin shots." Do you think that they would be bad symptoms?

A. I really couldn't judge. It would depend on so many other factors.

Q. Reading, I guess, Doctor, requires a certain amount of concentration, doesn't it?

A. I missed the first few words of that question.

Q. What?

A. I missed the first few words of that question.

Q. I say reading, reading,—— [135]

A. Reading, yes.

Q. Reading requires a certain amount of concentration, doesn't it, doctor? A. Yes.

Q. And I suppose on your test of counting backwards by threes and so forth, you find that some people are just a little bit more mathematically talented than others, don't you?

A. It makes no difference, it has all been calibrated and discounted to start with. We don't measure mathematic ability, we measure function of the mind with numbers.

Q. Do you think that anybody who is asked to

(Testimony of Dr. Walter Bromberg.)

count backwards from 51 by threes and they count 51, 49, 48,—they are emotionally unstable?

A. I didn't say — I wouldn't say that, and I didn't say that.

Q. I am asking you if that would be your contention, that people that might not be able to count backwards in leaps of threes might not necessarily have any emotional disturbance at all, is that right?

A. Oh, if you say disturbance, I would say no, it is not right.

Q. You were given a history of a slowing up in studies, were you, when she returned to high school?

A. On return to high school yes.

Q. Were you told, Doctor, that although she missed almost [136] two months of school she graduated from high school in the following February?

A. I was told they gave her a diploma as a matter of neurological aid. They gave her the diploma.

Q. They just gave it to her, that was your understanding? A. That was my understanding.

Q. And for her height, Doctor, I think you told us it was 5'¾ inches, she appears to be a reasonably well nourished young lady, doesn't she?

A. I would say she carries less weight than she should.

Q. Does she appear to you to be a reasonably well nourished lady right now in proportion to her height?

A. She is not mal-nourished, I will say that.

Q. In this Romberg test that you told us was

Testimony of Dr. Walter Bromberg.)

ositive, that is, closing your eyes and putting your eels together and holding your arms out in front f you, something like that, isn't it? A. Yes.

Q. And then if you start to weave a little bit, hy, that is a positive reaction, is that right?

A. Not exactly, no.

Q. Well, what is a positive reaction?

A. Well swaying and incoordination.

Q. And it is not uncommon to find people to ave a positive reaction to that? [137]

A. People who are nervous do commonly have iat reaction.

Q. You tested all the reflexes, did you, Doctor?

A. Yes.

Q. Did you find, as you told us, that people ave——

Mr. Stutsman: Speak louder, please?

Mr. Fitzwilliam: Oh, I am sorry.

Q. You find, you told us, that people have or istain this emotional instability from various auses at various times, don't they, a loss of loved nes and such, you were telling us, and disagree- ients and fights and so forth will cause an emo- onal instability?

A. In discussing psychic trauma I believe I alked about that. I was asked what is mental rauma.

Q. And those things can be created by any one f those causes and then as time goes on, why, in ne ordinary course of events people get over them, on't they?

(Testimony of Dr. Walter Bromberg.)

A. It depends on the amount of trauma, what it means to the person. Sometimes they do and sometimes they don't.

Q. Wouldn't you think good therapy, Doctor, for Miss Arramone, would be a job?

A. That would be a good thing for her to have.

Q. And that will tend to get her mind occupied on things that would maybe give her some incentive and some interest in something——

A. I agree.

Q. ——Is that right? [138]

A. Definitely.

Mr. Fitzwilliam: I think that is all.

Redirect Examination

By Mr. Stutsman:

Q. Just one question, Doctor. With reference to these tests that Mr. Fitzwilliam made reference to, like counting numbers and the swaying, and all the various things that you related, are those tests, or are they not recognized tests in the medical profession?

A. Oh, yes, definitely recognized.

Mr. Stutsman: That is all. Thank you.

Mr. Pacht: We have no questions, your Honor.

Mr. Stutsman: Thank you, doctor.

If the Court please, we have the deposition of Dr. Smalley, if you want to proceed.

The Court: Well, I am going to take the afternoon recess. We couldn't possibly finish it today.

Mr. Fitzwilliam: Your Honor, before we ad-

burn, might I suggest we have a short session in hambers, if we may?

The Court: Well, I am going to excuse the ury.

(Thereupon an adjournment was taken until Thursday, April 7, 1955, at 10:00 a.m.) [139]

Thursday, April 7, 1955—10:00 a.m.

The Clerk: Case No. 7007, Arramone vs. Prowse, nd Case No. 7004, Brunkala vs. Prowse, further rial.

The Court: The jurors are all present. You may roceed.

Mr. Nagel: Your Honor, with the Court's permission we would like to read Dr. Smalley's deposition into the record.

The Court: What is his first name?

Mr. Nagel: It is Dr. Charles J. Smalley, and he deposition was taken on the 3rd of November, 954, in Chicago.

DEPOSITION OF DR. CHARLES J. SMALLEY

(Thereupon the reading of the deposition of Dr. Charles J. Smalley was proceeded with, Mr. Nagel reading the questions and Mr. Stutsman reading the answers:)

"Q. Dr. Smalley, will you give us your full ame, please?

"A. Charles J. Smalley.

"Q. Are you, Dr. Smalley, a duly licensed and

(Deposition of Dr. Charles J. Smalley.)

practicing physician and surgeon in the State of Illinois? "A. Yes.

"Q. Dr. Smalley, where do your — where are your offices located?

"A. 1150 North State Street.

"Q. That is here, in Chicago?

"A. In Chicago.

"Q. Dr. Smalley, would you be kind enough to relate the schools you have attended and the degrees you have earned [140] prior to being licensed as a physician and surgeon?

"A. Bachelor of Science degree, Loyola University, Master of Science degree in the Post Graduate School, Loyola University, in Physiological and Chemistry, M.D., from Loyola University. I had a teaching fellowship in Loyola Medical School from 1926 to 1928.

"Q. Dr. Smalley, where did you intern?

"A. St. Joseph's Hospital.

"Q. And that is here, in Chicago, is it?

"A. In Chicago.

"Q. Where did you commence the practice of medicine?

"A. In Chicago, at 1150 North State Street.

"Q. And when did you commence it?

"A. 1933.

"Q. And have you been continuously in the practice of medicine since that time?

"A. Since that time, at the same address.

"Q. Dr. Smalley, do you belong to any medical societies?

Deposition of Dr. Charles J. Smalley.)

"A. Yes, the American Medical Association, Chicago Medical Society, Society of Industrial Surgeons and the American Railway Surgeons Association.

"Q. In what hospitals do you practice in Chicago?

"A. St. Joseph's Hospital, primarily. I attend various hospitals, among them, Augustana, Wesley, Passavant, Alexian Brothers. But the bulk of my work is at St. Joseph's Hospital. [141]

"Q. Dr. Smalley, in the practice of your profession, did you have occasion to and did you examine and treat Barbara Arramone?

"A. Yes, I did.

"Q. Well, when did you first see Barbara Arramone in the practice of your profession?

"A. Well, at the time she was delivered.

"Q. In other words, you were the attending physician at the time she was born, is that correct?

"A. That is right, I delivered her. That is correct.

"Q. Have you been the family physician since that time? "A. Since that time.

"Q. Now, did Barbara Arramone see you sometime in the latter part of the year 1953?

"A. Yes, she did.

"Q. And upon what date did she see you?

"A. Well, I saw her several times in 1953. The last date previous to her seeing me after the accident was in July of 1953.

"Q. And then you saw her sometime after she

(Deposition of Dr. Charles J. Smalley.)

claims to have been in an accident, is that correct?

"A. That is right. I saw her on October 9, 1953.

"Q. That was October the 9th?

"A. October 9, 1953.

"Q. Now, Dr. Smalley, did you at that time obtain a [142] history from Barbara Arramone?

"A. Yes, I did.

"Q. Will you please relate the history that you obtained?

"A. She stated that on or about the 27th of August, 1953, she was involved in an automobile accident, at which time she was asleep, as I remember, in the front seat of the automobile and had no warning of what was occurring until she found herself outside of the car. She was taken to a hospital, locally, where she was treated. She had suffered severe lacerations of the head and the face, and various other injuries which, at the time I saw her, I obtained only from her history.

"Upon examination, the scars from the accident were extremely evident, especially on her head and face, and various other places.

"She complained of headaches at the time, nervousness, restless sleep, painful left wrist, pain in her right knee, and complained, also, that these scars were tender and painful and were very annoying, due to their disfigurement; she also complained of painful mouth and teeth, and inability to maintain certain expressions, and to chew well; the reason for that was apparent, after examination.

(Deposition of Dr. Charles J. Smalley.)

"Q. Dr. Smalley, did you, yourself, make a physical examination upon this occasion that you saw Barbara? "A. Yes.

"Q. And would you please relate the findings of that [143] physical examination?

"A. On examination, she had numerous lacerations of the face and head, forehead, bridge of the nose, cheeks, and one extremely deep laceration on her left cheek. On palpating these, they were tender and sensitive. The laceration on the left cheek was of considerable concern because it apparently involved a nerve, and in a further examination it was evident that one of the branches of the facial nerve was obviously cut at the time and she was unable to perform certain functions of these muscles, such as grimacing and smiling, and that perhaps was one of the reasons why mastication was painful to her.

"Other examinations were made. She complained of tenderness and pain in the left wrist, and on examination it was found to be quite tender, and there was a little nodule present over the ulna; the suspicion of a fracture was evident, and a picture was made in my office and indicated a chip fracture of the bone of the wrist.

"Her right knee was extremely painful and there was a scar that had been recently sutured, and healed, and the tenderness and pain there was presumed to have been from the scar. Later on, however, after the scar healed, she had pain, and is having pain in that knee today.

(Deposition of Dr. Charles J. Smalley.)

"She told me in her history that she had been bleeding from the ear, and I had asked her if skull pictures had [144] been made, any X-rays of her skull, and to her knowledge, there hadn't been, so I made pictures of her skull and found no evidence of any bony pathology.

"Q. Dr. Smalley, concerning the X-rays of the skull, you stated that there was no evidence of bony pathology; does that exclude the possibility of brain damage?

"A. Oh, of course not.

"Q. Have you completed the physical findings that you made upon this occasion that Barbara Arramone saw you, Dr. Smalley?

"A. No. Generally, there was considerable nervousness, tension was elicited, that is, nervous tension; she seemed to have a little tic of the face, which is an involuntary jerking of the muscles.

"Her blood count was made and it was found she had a secondary anemia; the figures were, 79% hemaglobin, 3,750,000 red blood count; white blood count, and the rest of it, were within normal limits. Anything less than four and a half million certainly is on the suspicious side of anemia, and 3,750,000 would very definitely put her in that class. Certainly the extent of the lacerations would indicate that she had lost considerable blood, and it was presumed that her anemia was the result of the loss of blood.

"She was rather quite unstable and broke in tears on a couple of occasions, especially during the ex-

(Deposition of Dr. Charles J. Smalley.)

mination in [145] the X-ray room. The skull examination required her putting her face down on the X-ray plate and it was sensitive, and she burst into tears and complained how ugly she looked.

"Q. Dr. Smalley, you have given us the results of this blood count; did you take that blood count yourself?

"A. My technician took the blood count, under my supervision.

"Q. The technician works in your office, does she? "A. That is right.

"Q. She has training in that field, Doctor?

"A. Yes, she is a registered technician.

"Q. Were all of the acts that she performed within your offices and under your direct supervision and control? "A. That is correct.

"Q. To what, in your opinion, was the anemia attributable, Doctor?

"A. Loss of blood.

"Q. Doctor, did you notice anything unusual about the teeth of Barbara Arramone?

"A. Yes, yes, she had broken and missing teeth, and she was currently going to a dentist for dental repair, or had made an appointment. There were four teeth involved in this, and many of her teeth were loosened, but four were definitely broken.

"Q. Doctor, upon this occasion that Barbara saw you, did [146] she appear to be suffering pain?

"A. Yes.

"Q. Would you relate to us what you observed, in further answer to my question?

(Deposition of Dr. Charles J. Smalley.)

"A. Well, comparing her to when I had seen her previous to this trip that she had made, she had lost considerable weight, she was extremely nervous compared to her former behavior, and the pain, in motion,—now, in examining the wrist, for example, extended and flexed, abducted and adducted, would cause considerable pain, especially on flexion and adduction. The knee was tender on feeling, or on palpation, and on motion of the joint, especially flexion, caused considerable pain. And there was pain over what is known as the patella, or kneecap. A scar, a recent scar was slightly above that area and it was presumed that the healing that was taking place and scar tissue that was growing in was involved in the pain.

"The scars on her face were, naturally, tender, as they would be, after recent suturing, and so on.

"She complained of some pain in the chest, but on examination of her chest, there were no positive findings.

"Q. You have stated, Dr. Smalley, that you did take X-rays of the wrist, as well as the skull, is that true? "A. That is right.

"Q. And those X-rays were taken where? [147]

"A. In my office.

"Q. And do you have X-ray equipment there?

"A. I do.

"Q. What kind of equipment do you have?

"A. It is a Mattern machine.

"Q. What did you do, as a physical thing,—

(Deposition of Dr. Charles J. Smalley.)

rst of all, these X-rays you have, are they the
-rays of Barbara's wrist and skull?

"A. That is right.

"Q. What, as a physical, practical thing did you
o, or any of your assistants do, to assure yourself
iat these are Barbara's films?

"A. The films are marked with a marker which
s put on at the time of the films being made.

"Q. May we have that in the record, that there
s a code number used by you, Doctor, in identify-
ig the X-rays as being those of Barbara Arra-
ione? "A. That is correct.

"Q. I am interested, at the moment, in the
rist situation; may we have those?

"A. Now, at the time she appeared, she was very
xcited and very upset and the primary—she had
ist come from a hospital where she had been
reated and had been under observation, and the
rimary concern at the moment was quieting her
own. She was put under sedatives and anodynes,
nd iron and [148] liver were prescribed, to be
iken orally.

"I saw her subsequently. These pains persisted,
nd I got more of the history, such as the bleeding
f the ear, and so on. So, the pictures were de-
erred until she was in a more stable condition to
o through all this procedure. This is the picture
f her wrist.

"Q. Doctor, the response that you have just
iven us, that is in evidence, was that a further
art of your physical examination?

(Deposition of Dr. Charles J. Smalley.)

"A. That is correct.

"Q. Now, this X-ray that we have here, may we have this introduced into evidence as Plaintiff's Exhibit next in order, marked S-1, for identification?"

Mr. Fitzwilliam: May we have that?

Mr. Stutsman: Is there a shadow box in court, your Honor?

The Court: There is one available.

Mr. Nagel: There is one available.

Your Honor, may we have this X-ray film that has been referred to in the deposition as——

The Court: Plaintiff's Exhibit 43 for the Plaintiff Arramone.

(The X-ray film referred to was marked Plaintiff's Exhibit No. 43 for the plaintiff Arramone.)

"Q. Dr. Smalley, I show you what appears to be an X-ray film that has upon it—— [149]

"A. Do you want me to stand over here by the window?

"Q. Is that your name, 'Charles J. Smalley'?

"A. That is right.

"Q. And what else is there on that film in the way of identification?

"A. The code number 772 L, 'L' indicating the left wrist. This piece of bone——

"Q. Just a moment, Dr. Smalley. Is that Barbara Arramone's——

"A. That is Barbara Arramone's.

"Q. Is that her wrist, in two different forms?

(Deposition of Dr. Charles J. Smalley.)

"A. In two different positions."

Mr. Nagel: At this moment, I am asking that this X-ray be introduced into evidence.

Mr. Fitzwilliam: I have no objection.

"Q. Well, Doctor, first of all, will you tell us what that X-ray shows?

"A. The X-ray shows a chip fracture of the distal portion of the ulna bone.

"Q. Can you circle that portion that you have just described and not interfere with anyone else looking at or properly examining the pathology?

"A. Yes.

"Q. Would you so mark that?"

Mr. Fitzwilliam: And the record shows that the witness [150] marked the X-ray.

"Q. Doctor, you have described the pathology shown on this X-ray as being a chip fracture of the ulna, is that correct?

"A. That is correct.

"Q. Now, this X-ray film that you have here, does that show any damage to the nerves, muscles, ligaments, tendons, or soft tissue?

"A. No.

"Q. Have you taken any X-ray films of Barbara since the occasion that this X-ray was taken of her wrist, Doctor?

"A. No films have been made since.

"Q. You have seen Barbara Arramone professionally how many times from the first visit, after her visit to California, that you have just described, Doctor?

(Deposition of Dr. Charles J. Smalley.)

"A. I have seen Barbara Arramone eighteen times.

"Q. On those eighteen visits, did they have anything to do with the injuries that you have testified to? "A. Definitely, yes, sir.

"Q. When did you last see Barbara professionally, Dr. Smalley?

"A. On the 14th of October, of this year.

"Q. Did you examine Barbara at that time?

"A. That was a pre-operative examination, preparatory to her going to the hospital for plastic surgery for the *removal* [151]

"Q. What was the condition of Barbara's wrist, Doctor, on this last occasion that you saw her professionally?

"A. It was still tender and painful.

"Q. Was the use of her wrist any different from —this was her left wrist, wasn't it?

"A. That is correct.

"Q. Was it any different, in any way, in your opinion, Doctor, from the right wrist?

"A. Yes.

"Q. In what regard was it any different?

"A. There was weakness in the use of the wrist, weakness of the hand, compared to the other hand. There was pain on motion, both passive and direct motion.

"Q. Pain is a subjective complaint, as you doctors call it?

"A. Yes, it is a subjective complaint, but it is evidenced many times by a wince of the face, or an

(Deposition of Dr. Charles J. Smalley.)

objection, or an expression of "ouch," something of that sort.

"Q. On the wrist here, did you observe or find any objective findings that were corroborated——

"A. Tenderness on pressure over the area, as outlined earlier, which is the ulna, which is on the little finger side of the hand.

"Q. Dr. Smalley, with reference to the wrist, do you have an opinion, based upon reasonable medical certainty, as [152] to the future outlook of this wrist?

"A. Yes, she will probably always have some difficulty, some pain, there may be some permanent weakness, but to what extent, it would be impossible to guess. But these things most frequently leaves some little damage as permanent. There has been a loss of bone, small, it is true, but there has been some displacement.

"Q. When you say 'displaced fragment,' what do you mean by that?

"A. The fragment is not in its original position, where it is still attached to the bone.

"Q. Doctor, you have testified that Barbara complained of headaches when you first saw her; will you tell us, first of all, did those headaches continue?

"A. The headaches have continued.

"Q. What was the situation, medically, with reference to Barbara's headaches upon the last occasion that you saw her professionally?

"A. She complained of headaches.

(Deposition of Dr. Charles J. Smalley.)

"Q. From your knowledge of Barbara, and her history, do you know to what those headaches are attributable? "A. Not positively.

"Q. Doctor, do you have an opinion, based upon reasonable medical certainty as to the future outlook of Barbara's knee?

"A. Again, as with the wrist, there has been trauma, as [153] evidenced by the scar. How deep the original laceration was, I have no way of knowing, because I didn't see it at the time, but the stitches marking—but the stitch marks were still evident when I examined her the first time, so I presume it was sufficiently deep to require suturing; the skin over the knee in that area is thick enough, but there is very little tissue below it in the way of muscle or fat, and it is quite possible that the capsule of the joint and the ligaments surrounding it were injured at the time, perhaps lacerated, scar tissue growing into those ligaments can cause a painful and sensitive knee.

"Q. Doctor, did you prescribe any medication for Barbara, for her headaches, during any of the time that she saw you these eighteen visits that you have described?

"A. Yes, I prescribed medication for her headaches and nervousness, and also for anemia.

"Q. You treated Barbara, of course, and have so testified, prior to the time she complained of having been involved in an accident?

"A. That is correct, yes, sir.

(Deposition of Dr. Charles J. Smalley.)

"Q. You have described the damage done to the eft cheek, Doctor, have you not?

"A. That is right.

"Q. Do you have an opinion, based upon reasonble medical certainty, as to whether that damage s permanent in nature? [154]

"A. Where nerves are severed, it is usually permanent.

"Q. My question called for a 'yes' or 'no' answer. "A. Yes.

"Q. And what is that opinion?

"A. Nerves regenerate from the ganglia which s located in or adjacent to the spinal cord and they egenerate out to the point of severance. It is comnon practice, in cases of intractible pain, to sever he nerve. We collapse a lung by severing the hrenic nerve and paralyze that muscle, which remains permanent. There is a procedure which just rushes the nerve, which this is not the case. In ny opinion, the nerve was severed.

"Q. And is that severing of the nerve a permaent something, Doctor? "A. Yes.

"Q. Doctor, did you observe in the recent past he condition of Barbara's right eye?

"A. That is an observation that was made just ecently and it is a complication of this whole ituation; apparently as scarring has occurred there as been either some damage to a nerve that supplies the upper lid or it was originally damaged nd then degenerated. Now, degenerating nerves equire considerable time. Her eye is not closed

(Deposition of Dr. Charles J. Smalley.)
completely when in repose, as in sleep, and this has been observed by members of her family. She has had some irritation of the [155] eye because the normal moisture hasn't been there, because she has been unconscious during sleep and unable to blink her eye and keep the conjunctiva and cornea moist.

"Q. Dr. Smalley, would you give us your diagnosis of Barbara Arramone, if you made such, that resulted from your examination of Barbara upon her first visits to your office?

"A. As a result of her examination, following the accident, I made a diagnosis of secondary anemia, probably due to loss of blood, extensive disfigurement and scarring of her face—extensive scarring of her face with evidence of paralysis of a facial nerve, broken and missing teeth, traumatic arthritis of right knee, chip fracture of left wrist, extreme nervousness and psychotic tendencies.

"Q. And, Dr. Smalley, has that diagnosis changed any up to the time that you last saw Barbara?

"A. I will not have to comment on the facial disfigurement as the resut of that being in the hands of the plastic surgeon.

"The headaches have persisted to this date; she still has pain and there is evidence of arthritis of the wrist, also of the knee; nervousness has remained about the same; there is definite evidence of personality changes in her makeup which, hav-

Deposition of Dr. Charles J. Smalley.)

ıg known her since birth, is something foreign
› her.

"Q. Dr. Smalley, you have made mention of
ersonality changes; what were those changes?

"A. The changes are composure, she has evi-
enced emotional instability as a result of fear and
orry and concern about her appearance. She has
ecome irritable. She has lost appetite. There has
een a seventeen pound loss in weight over the
eriod since before the accident to the present time.
he anemic picture has improved.

"Q. I will ask you to what are those personality
ıanges attributable?

"A. I would say a psychic shock and a concern
ver her personal appearance, as to what her future
going to be.

"Q. Dr. Smalley, do you have an opinion, based
n reasonable medical certainty, as to any treat-
ıent that may be reasonably required in the fu-
ıre? "A. Yes.

"Q. And what, in your opinion, is such treat-
ıent, if there is any reasonably required?

"A. Well, continuation of plastic surgery to
btain the most effective result with the least
mount of permanent disability and deformity;
ontinuing treatment relative to the wrist to deter-
ıine the progress of this piece of bone; also, con-
ıued examination of this traumatic knee which
as been arthritic, and very definitely, investigation
nd observation of her psychic make-up. This has
een suggested to the patient several months ago.

(Deposition of Dr. Charles J. Smalley.)

"Q. Did you prescribe such treatment, Dr. Smalley? "A. Yes.

"Q. Doctor, you have described Barbara's headaches; do you have an opinion, based upon reasonable medical certainty, as to whether these headaches are a permanent something? "A. Yes.

"Q. And what is your opinion, as a physician and surgeon, as to the future outlook concerning these headaches that Barbara has?

"A. In cases where there has been face and head injuries, even though there has been no evidence of fracture, it is nothing common to have had some brain trauma, either in the form of actual bruised brain tissue, or even small hemorrhages that frequently go without being picked up on examination; those effects would be permanent and it is very likely that the pattern which has not changed, as far as the headaches are concerned, since this has been over a year, would continue.

"Q. Doctor, what, if any, effect has the time element? You have just stated it has been some fourteen months since this accident took place; what effect, if any, does this time element have upon your opinions you have just given?

"A. It is quite significant in that usually anything that is due to a—anything of a temporary nature would have been relieved long before the expiration of the time we are referring to. [158]

"Q. Dr. Smalley, what have been your charges for treating Barbara Arramone to date?

"A. The charges to date have been $160.00.

(Deposition of Dr. Charles J. Smalley.)

"Q. And those charges, were they all chargeable to the condition you have just related?

"A. Yes.

"Q. Are those charges, in your professional opinion, reasonable charges?

"A. Yes, I think so.

"Q. Now, do you have an opinion, based upon reasonable medical certainty as to the charges that you would make for any treatment that you may give Barbara in the future?

I would like to have you, in answering that question, disregard any charges that may or may not be made for plastic surgery or dental work, but in answer my question I would suggest that you merely evaluate and give us your best judgment as to your charges that you would make if you continued treatment, yourself, in the manner that you have testified to here.

"A. Certainly a condition with a continuing problem may require considerable treatment; that treatment may extend over a period of many years. Treatment, also, as I have indicated earlier, continued investigating, if other things come up or are found, the cost of which treatment would certainly be variable because outside help might be necessary, in the way of a neurologist or psychiatrist, whose fees I couldn't estimate. [159] My own fees, let me say that perhaps $100.00 a year would be the originary general fee, and the length of time would be dependent upon the response.

"Q. Dr. Smalley, that estimate of $100.00 a year,

(Deposition of Dr. Charles J. Smalley.)

is that, in your opinion, as a physician and surgeon, reasonable?

"A. That is quite reasonable. And may I add that this is my fee only, and would not include the cost of medications or prescriptions, or other treatments that might be necessary outside of my own jurisdiction.

"Q. And did your charges include a psychiatrist's charges, for example? "A. No.

"Q. Or a neurologist's charges? "A. No.

"Q. Or a plastic surgeon's charges?

"A. No.

Mr. Nagel: I have no further questions of Dr. Smalley at this time."

Cross Examination

(Questions read by Mr. Fitzwilliam, answers by Mr. Stutsman.)

"Q. Dr. Smalley, you saw Barbara Arramone when previous to October 9 of 1953? Do you have your record there?

"A. It was in July. I don't have the exact date.

"Q. Do you have your office records with you in connection [160] with the treatment that you administered to her in July of 1953? "A. No.

"Q. How long had she been under your care before July of 1953? "A. Since her birth.

"Q. I see. And for what had you treated her immediately before July of 1953?

"A. She was in for an acute upper respiratory, in other words, a cold.

(Deposition of Dr. Charles J. Smalley.)

"Q. And how long had she been under your care immediately prior—before July of 1953?

"A. Since her delivery.

"Q. And that would be how many years?

"A. Eighteen years; approximately eighteen years.

"Q. Has she been continuously under your care for this period of time?

"A. Continuously. I was her doctor during those years and saw her perhaps on an average of two or three times a year early in her infancy and childhood.

"Q. Did you ever have her hospitalized before July of 1953 for any reason at all?

"A. For tonsillectomy.

"Q. Now, Doctor, after October 9, 1953, I believe you said that you had occasion to attend and treat her professionally [161] in connection with the alleged injuries that she sustained at about eighteen different occasions, is that correct?

"A. That is right.

"Q. And the last time that you had occasion to attend and treat her, other than examine her, was as of what date, sir?

"A. As of the date I mentioned earlier in this examination, for her pre-operative examination. I treated her by prescribing a sedative in addition to that which she was taking.

"Q. When before October 14, 1954, had you had occasion to attend or treat her?

(Deposition of Dr. Charles J. Smalley.)

"A. I believe that was approximately a month prior.

"Q. And the eighteen professional visits that she had with you and while under your care extended from October 9, 1953, to October 14th of 1954, is that correct?

"A. That is correct.

"Q. Now, within the first month after October 9, 1953, can you tell me how many times you attended and treated her in that span of time?

"A. In that span, there were five or six treatments.

"Q. And in November of 1953, how many times did you see her professionally and in connection with the alleged injuries?

"A. I believe there were two treatments in November. [162]

"Q. And I take it, then, thereafter, Doctor, you saw her about once a month, is that correct?

"A. Approximately.

"Q. Now, you have mentioned that you had occasion to have x-rays taken of Barbara Arramone's upper extremities, and that was the left arm, is that correct? "A. Left wrist, specifically.

"Q. The wrist of the left arm?

"A. That is correct.

"Q. Now, you have already testified that there was a chip fracture in the ulnar bone, is that correct? "A. Correct.

"Q. Would you say that that was in the styloid process of the ulnar bone?

Deposition of Dr. Charles J. Smalley.)

"A. That is correct.

"Q. And in looking at this x-ray film, the chip a very small chip, isn't that true, Doctor?

"A. It is a chip.

"Q. There isn't any tear of the periosteum round the ulnar bone or the styloid process, is here?

"A. There would have to be a tear in order to release the fragment.

"Q. Let me ask you this, Doctor, is there any vidence of tearing of the periosteum on this film, hat is demonstrated as I am holding it in my and? [163] "A. No, there isn't.

"Q. All right.

"A. No evidence on the film.

"Q. Okay. Now, there wasn't any evidence of ny swelling or edema when you examined this -ray—when you caused this x-ray to be taken in November of 1953, isn't that true, Doctor?

"A. There was swelling.

"Q. This patient's left arm, at the wrist, was ever casted, was it?

"A. It was immobilized.

"Q. But it was never casted, was it?

"A. No.

"Q. Did you use an Ace bandage on that, Doctor?

"A. It was immobilized with a splint and adhesive tape.

"Q. Now, on the lateral film, on Plaintiff's Ex-

(Deposition of Dr. Charles J. Smalley.)

hibit S-1, for identification, there is no evidence of bone pathology on that film, is there, Doctor?

"A. No, there isn't.

"Q. On the lateral view? "A. No.

"Q. This film that was taken under your direction and supervision was taken in November of 1953, and there was no film taken thereafter, was there? "A. Correct. [164]

"Q. So that you don't know, as a matter of fact, presently, Doctor, do you, whether or not that very small chip fracture of the styloid process has dissolved? "A. No.

"Q. It might have dissolved, isn't that true?

"A. I don't know.

"Q. All right. Doctor, you are a general practitioner, isn't that true? "A. Correct.

"Q. You are not a specialist in psychiatry, are you?

"A. I studied psychiatry and consider myself capable of handling psychiatric problems in the usual run.

"Q. You are not a specialist in psychiatry, though?

"A. I haven't passed the Psychiatric Certification Board.

"Q. You have testified, Doctor, that there was evidence of arthritis in the right knee, is that correct? "A. Correct.

"Q. Now, you have not had any x-rays taken of that right leg or knee of Barbara Arramone of recent date, have you? "A. No.

Deposition of Dr. Charles J. Smalley.)

"Q. Did you ever take an x-ray of Barbara Arramone's right leg at the knee?

"A. I had an x-ray report.

"Q. No. Did you? Just answer, please.

"A. I didn't, no. [165]

"Q. All right. And the best evidence of whether r not there are arthritic changes or evidence of rthritic pathology in bone anatomy is an x-ray lm, isn't that true, Doctor?

"A. It is not true.

"Q. Well, you will see arthritic spurs on the -ray film if they are arthritic, isn't that true?

"A. Arthritic spurs can be detected on an x-ray lm, but it isn't early.

"Q. Well, arthritis is a systemic condition, isn't iat it, in its origin? "A. No, not always.

"Q. How many types of arthritis are there, Doc-)r?

"A. There are many types of arthritis, infec- ous arthritis, osteoarthritis, which would be hyper- ·ophic and atrophic, and traumatic arthritis, which due to an injury. The classification has been re- ised recently and is still being revised as a result f our newer approach.

"Q. So that your diagnosis is entirely based on our clinical examination of this patient, insofar s evidence of arthritic changes?

"A. Correct.

"Q. Doctor, did you perform any neurological ests on Barbara Arramone?

"A. No—yes, let me say; correct that. I exam-

(Deposition of Dr. Charles J. Smalley.)

ined her face and found she was unable to—— [166]

"Q. Just answer. Yes, you did, is that correct?

"A. Yes.

"Q. And what tests of a neurological nature did you conduct? Name them.

"A. The test of the use of the muscle; no——

"Q. Did you perform—I am sorry.

"A. ——no electical tests were made.

"Q. Did you perform a Romberg test?

"A. Yes, sir.

"Q. And when did you perform a Romberg test?

"A. During the course of her examination.

"Q. What is a Romberg test?

"A. Romberg test? Having the patient standing on the floor to see whether she is weaving.

"Q. You don't have your office cards with you insofar as those tests that you made?

"A. No, I don't.

"Q. You are relying entirely on memory, is that correct?

"A. That is correct. She was—should I——

"Q. If it is in an explanation to your answer,—— "A. No.

"Q. By all means proceed, Doctor.

"A. Excuse me.

"Q. Barbara Arramone is right-handed, isn't she? "A. Correct. [167]

"Q. The injury that she had, of this minor chip of the styloid process, is in the left extremity, or the left arm? "A. Right.

"Q. Now, Doctor, you mentioned something

(Deposition of Dr. Charles J. Smalley.)

about headaches, and that is a subjective complaint, wholly within the control of the patient, isn't that true? In other words, I might tell you that I have a headache right now and you couldn't tell whether I have one, or not, is that correct?

"A. That is correct, but I don't say it is within the control, the patient's control, to produce or dispense with a headache.

"Q. Well, what I mean is this, insofar as control,—— "A. Maybe I misunderstood.

"Q. ——I mean that the patient might tell you that she has a headache and you couldn't tell whether or not she was telling the truth, isn't that true? "A. Right.

"Q. Barbara Arramone wasn't placed in the hospital by you when she came to your office for the first time in October of 1953, was she?

"A. No.

"Q. She was entirely ambulatory and she walked into your office upon the first occasion you saw her, is that correct? "A. Yes. [168]

"Q. An excellent result was obtained insofar as this injury to the wrist, in view of the fact that you did not take additional x-rays; I take it that is true, isn't it, Doctor? "A. No, it is not true.

"Q. Well, if you didn't obtain an excellent result, you would have taken another x-ray in order to correct anything?

"A. Absorption of bone requires considerable time and further x-ray studies were advised and was anticipated.

(Deposition of Dr. Charles J. Smalley.)

"Q. But no x-ray has been taken for a period of almost, well, for one year, as a matter of fact, isn't that true?

"A. Lacking one day. By way of explanation——

"Q. If it is an explanation to your answer, please proceed.

"A. She has been busy with attending a plastic surgeon, or consulting plastic surgeons, and has kind of neglected some of the less important complaints.

"Q. Doctor, is that in answer to the prior question, that last statement that you gave?

"A. In answer to the question?

"Q. Yes.

"A. Yes, by way of explanation.

"Q. Doctor, you are acquainted and know of Dr. Paul Magnuson? "A. Yes. [169]

"Q. An eminent and outstanding orthopedic surgeon in the Middle West? "A. Yes, sir.

"Q. If I were to tell you that he states that a fracture of a styloid process of an ulnar bone resolves itself in very little disability, would you say that Dr. Magnuson is wrong in that regard?

"A. It would depend on the type of the fracture.

"Q. I am speaking of a chip fracture of the styloid process of the ulnar bone.

"A. I would disagree in that it is never always true.

"Q. All right. I believe you mentioned that there was no evidence of any muscle, nerve or tissue dam-

(Deposition of Dr. Charles J. Smalley.)

age within the area of the radius and the ulna when you examined Barbara Arramone and examined the x-ray film?

"A. There is no x-ray evidence of soft tissue damage.

"Q. The extent of your professional services within the past twelve months, during which time you have seen Barbara Arramone approximately once each month after December of 1953, consisted of what type of treatment?

"A. The treatment consisted of examination, repetition of blood counts to check on treatment, changing of medication in an attempt to relieve the headaches; also, I spent a good deal of time counselling with her relative to this mental problem, this instability that she was exhibiting, and [170] trying to encourage her as to the results, not to be afraid, and she should get out among people, and even encouraged her to obtain a position.

"Q. Now, you mentioned that Barbara Arramone is eighteen years of age presently, is that correct? "A. I believe that is correct.

"Q. Was she a student in high school during the time you attended and treated her?

"A. Well, she had graduated from high school.

"Q. As of when, Doctor? Your best——

"A. As of the previous June, of—June of '53.

"Q. By the way, you did not perform any spinal tap here, did you? "A. No.

"Q. To determine whether or not there was any brain damage?

(Deposition of Dr. Charles J. Smalley.)

"A. It was too late after the original accident. It wouldn't have shown any positive test, if even there had been.

"Q. There was no evidence of bony pathology in the skull plates that you took? "A. Correct.

Mr. Pause: No other questions."

Mr. Fitzwilliam: Now, if your Honor please, I would like very well if we may have a view box to put this X-ray on for the jury to see. [171]

(The x-ray referred to was placed in a view box.)

Mr. Fitzwilliam: You might explain that this is what is referred to as the lateral view in the X-ray.

Mr. Stutsman: May I explain that to the jury? This view here, which will be stipulated is called an anterio-posterior view, that is, turned to the back with the hand down, and this view here would be the lateral, that is the side view, and the circle here is the circle that the doctor circled where the bony pathology is, and we will stipulate with counsel that that is the chip fracture here (indicating).

Mr. Fitzwilliam: That that is the chip apparently that he referred to, right there (indicating).

Mr. Stutsman: In here, what is called the styloid process of the ulnar bone, is that right?

Mr. Fitzwilliam: Yes. I think for the clarification of the jury we might also stipulate that the doctor says that nothing shows in the later view.

Mr. Stutsman: In the lateral view, this view, looking in this direction, it isn't picked up in that view. Thank you. [172]

Mr. Nagel: (Reading.)

"Q. Dr. Smalley, did you have occasion to——"

The Court: I think perhaps we might take the orning recess. You are starting a new deposition?

Mr. Pacht: That is right.

The Court: Ladies and gentlemen of the jury, e will take the morning recess. Remember the adonition of the Court heretofore given you.

(Recess.)

The Court: The jurors are all present. You may roceed.

Mr. Fitzwilliam: Your Honor, it is agreeable ith counsel, and with your Honor's permission I ould like to call Dr. Petzold now because of arngements previously——

The Court: You may do so.

Mr. Fitzwilliam: Dr. Petzold, will you take the and, please? [173]

DR. HAROLD V. PETZOLD

lled as a witness for the defendant out of order, worn:

Direct Examination

Mr. Fitzwilliam: Q. Your name is Dr. Harold etzold? A. That is correct.

Q. What is your business or profession?

A. Neurology.

Q. And are you a duly licensed physician and rgeon?

A. I don't do any surgery, just medical neuology.

(Testimony of Dr. Harold V. Petzold.)

Q. You are licensed to practice neurology in the State of California? A. I am.

Q. And would you tell us something, doctor, about your training, beginning with your schooling, when and where?

A. I took my final medical degree in the University of Tennessee School of Medicine in 1945, I interned at Binghamton City Hospital of New York, I was then in the Army Service for two years, and then returned to San Francisco where I was four years in neurology, resident work.

Q. And how long have you been practicing in Sacramento, Doctor? A. Three years.

Q. Are you a member of any neurological associations or societies? A. Most all of them.

Q. Are you a member of the American Board of Neurologists? [174] A. Yes, sir, I am.

Q. Doctor, at my request did you make an examination last Thursday of Miss Barbara Arramone? A. Yes, I did.

Q. And was that examination a complete neurological examination?

A. It was a neurological examination.

Q. And did it include an examination of the nerves? A. Yes.

Q. All right, and that would be—would you describe what type of nerves, sensory and so forth?

A. Well, the neurological examination was rather extensive. It involves not only a historical description of the symptoms but also an objective

Testimony of Dr. Harold V. Petzold.)

valuation of the patient in terms of what neuro-gical defects may or may not be present.

Q. Now, doctor, you also examined the reflexes?

A. That is part of the neurological examination.

Q. Yes. And tell us what you found regarding he reflexes as far as Barbara Arramone is con-erned?

A. I found no abnormality of either the deep eflexes of the extremities or the superficial reflexes the abdomen.

Q. Now, in addition to your examination that ou told us about, of the nerves and the reflexes and forth, did you do a Romberg?

A. Yes, I did. [175]

Q. Make a Romberg test. And what is that, octor?

A. The Romberg is essentially a sensory test. is tested by having the individual to stand heels nd toes close together, putting them on a small ase, having them to close their eyes and then atching for any faultiness of movement or unusual vay or falling, even.

Q. And what did you find from your test in that egard as far as Miss Arramone is concerned?

A. There was mild swaying, but I did not feel at it was significant of any neurological disorder.

Q. Is that something that you might find, a mild vaying with anyone, without any neurological sig-ificance? A. Yes, it is.

Q. Now, did you, in the course of your examina-

(Testimony of Dr. Harold V. Petzold.)

tion, make any examination of Miss Arramone's gait?

A. Yes, I observed her gait from time to time in examining the situation.

Q. And did you find anything abnormal about her gait? A. No, I did not.

Q. Was she well oriented?

A. Yes, she was.

Q. All right. Now, doctor, I am trying to shorten this and I am going to exclude for the moment from this question the left side of Miss Arramone's face and I am going to ask you aside from that area, in your examination, your neurological [176] examination, did you find any objective evidence of any neurological disorder?

A. No, I did not. The examination was essentially within the normal limits.

Q. Now going to the left side of the face, what did you find there, doctor?

A. Well, of course there were a number of healed scars of previous lacerations that were observed crossing the face and the forehead and the nose. So far as the neurological examination was concerned, there were patchy areas of diminished pain sensation over the left side of the face and occasionally a random irregular muscular twitch would be noted to play over the left side of the face.

Q. All right. And that, of course, in your examination was an objective finding of some—that was an objective finding that you made?

A. Yes.

(Testimony of Dr. Harold V. Petzold.)

Q. And to understand your testimony, then, aside from that you found nothing abnormal or neurological? A. I did not find anything.

Q. All right. Now, did your examination, doctor—one point here—did it include, your examination of the nerves, the—just one moment, please—the ocular nerves—the ocular nerve, the olfactory nerve, did it include those?

A. Yes, all twelve cranial nerves. [177]

Q. All right. That is as far as the neurological examination goes as far as the testing of the nerves is concerned, those twelve, is that right?

A. We examined all twelve nerves.

Q. All right. And you have different methods of examining each nerve, is that right.

Q. Without going into detail. All right. Now, doctor, did you examine an electroencephalogram chart taken upon the person of Miss Arramone?

A. I examined that record as a process of reading all records that were taken here in Sacramento.

Q. Is there anyone else in Sacramento that makes those readings other than yourself?

A. They do not make them as a part of the examinations coming through those laboratories, they may be able to read them, but they don't do them on the basis of being considered an electroencephalographer, set up to read those records.

Q. In other words, you are the only one in Sacramento that makes those readings?

A. That is correct.

Q. Now, in that regard, doctor, would you tell

(Testimony of Dr. Harold V. Petzold.)

us what is this electroencephalogram? Would you give us something about it?

A. The best way to explain it is to compare it with heart waves. Most people are familiar with the electrocardiogram, [178] which traces certain electric properties of the heartbeat on a photographic piece of paper. The electroencephalogram, abbreviated as an "E.E.G.," is essentially the same type of test. It is an arrangement of the electrical potentials that are given off by a normal functioning brain.

Q. Now, doctor, is it ever in itself a complete diagnosis?

A. No, it is like any other laboratory test, it must be correlated with the clinical history and various findings that may be found on examination.

Q. Yes. In other words, at the most it is only a part of the examination to come to a diagnosis?

A. It is a part of an examination.

Q. And, doctor, what does this chart read that you saw?

A. An interpretation of the record as a whole was to the effect that it was a diffused mildly abnormal record.

Q. Mildly abnormal? A. That is correct.

Q. And, doctor, is that the type of record that you might obtain on an electroencephalogram on many occasions from people who haven't been involved in an accident or trauma?

A. Yes, this can be considered such. We cannot come to any strong fast conclusions regarding the

(Testimony of Dr. Harold V. Petzold.)

findings in any one E.E.G. Again it must be correlated with the history and findings.

Q. All right. Now, doctor, correlating that graph with [179] your examination of Miss Arramone, and your obtaining of a history, was there any history of any convulsions?

A. I did not get any history of any convulsions.

Q. Correlating that graph, that gram, that mildly diffused pattern, with your examination clinically, all of the things we haven't gone into in great detail in this neurological examination, is there in your opinion anything alarming about the encephalogram?

A. No, I wouldn't say it is alarming.

Q. Is it possible that the same encephalogram two years ago may have revealed the same mildly diffused pattern?

A. It is possible. There is no way of knowing that, unfortunately.

Q. An encephalogram is merely a part, as I understand it, of an examination?

A. That is correct.

Q. Now, did Miss Arramone give you the complaint of headache? A. Yes, she did.

Q. And is that entirely a subjective complaint, Doctor?

A. Headache like any and all other pain is subjective.

Q. All right. And if I were to tell you, doctor, that according to hospital records Miss Arramone, on the day following this accident was alert, and

(Testimony of Dr. Harold V. Petzold.)

on the day following that she was alert, and I think on the day following the accident was visited by an uncle and was not disturbed about it, and [180] taking that history together with your findings at the time of your examination is there anything in your opinion to account for those headaches?

A. No, sir, other than accept the history of head trauma is all that we have to go by.

Q. With that history, doctor, would you consider it unusual that headaches would persist until this time?

A. Yes. As a general rule, the post traumatic headache tends to gradually clear over a period of time, which is quite variable. Usually in a year, year and a half, we expect usually to see them leave.

Q. Yes. And, doctor, I should have added this: If I told you that X-ray pictures of Miss Arramone's skull were entirely negative as to any fracture, would that be in any way more reassuring as to the probability of the headaches ceasing?

A. Well, you can't correlate headache—fracture. It would be reassuring in that we have some idea of what happened to the skull as a result of trauma. Usually we are not too much concerned with fracture unless it is of a particular type, depressed or crossing an area in which a blood vessel may pass, thereby lacerating a blood vessel.

Q. Can your headaches be entirely on an emotional basis, doctor?

Mr. Stutsman: I didn't hear that.

Testimony of Dr. Harold V. Petzold.)

Mr. Fitzwilliam: Can headaches be on an entirely emotional basis? [181]

A. They have been claimed to be. Each case must be evaluated in its own rights.

Q. Are there many causes for headaches?

A. Many causes for headaches.

Mr. Fitzwilliam: That is all.

Cross Examination

Mr. Stutsman: Pardon me, your Honor, is it my correct understanding that this testimony is offered only with respect to the Arramone case?

Mr. Fitzwilliam: Oh, yes.

Mr. Stutsman: Very well. Thank you.

Q. Doctor, you did not give us the benefit of your history in this case. Will you give us that now? All you have talked about is subjective complaints.

A. The only thing I talked about is what I was asked. If you desire that I will give you the history.

Q. Will you give us it, please?

A. The history ran something as follows: On the evening or the night of August 27, 1953, the patient was involved in an auto accident somewhere in the environs of Stockton. As a consequence of the auto accident her face and head were forcibly thrust toward the windshield, and as a consequence of that she sustained multiple lacerations and apparently was unconscious for an undetermined period of time. [182] My time was that she was unconscious for two days.

(Testimony of Dr. Harold V. Petzold.)

She was initially hospitalized at the San Joaquin General Hospital and after being there for some four or five days was transferred to the St. Agnes Hospital in Fresno, I believe.

The extent of injuries, so far as I was able to determine, consisted of multiple lacerations of the face, forehead; she sustained a fracture of the right wrist, I believe—I may be incorrect in that, it is one of the wrists.

Mr. Fitzwilliam: May I interrupt, your Honor? I take it that the doctor is now repeating the history as he received it.

Mr. Stutsman: That is right.

Mr. Fitzwilliam: This is the history?

A. Yes. And there was also a laceration of the right knee. Aside from that there seems to be no other pertinent history of any serious injury.

As I clearly noted, the patient subsequently had plastic surgical repair by a plastic surgeon in Chicago for her facial lacerations.

Mr. Stutsman: Any further history, doctor?

A. That is essentially the history of the accident.

Q. How about complaints,—any history of complaints that she made from the time of the accident to the time you saw her?

A. The patient complained of headaches as we have talked of, generalized for the most part, lasting from two or three hours to maybe the entire day, more or less continuous up to the present time.

She also complained of episodes of dizziness which would occur three or four times a week, very

(Testimony of Dr. Harold V. Petzold.)

ransient, not indicated to be of any true vertigi-
ous origin.

More recently she has complained of a sense of lacking out, lasting for a split second, as she put t. What this actually amounted to, I could not say.

Another complaint was within the past six or even months waking up with a peculiar sensation s if a cat were purring on her throat. I could not omprehend that.

Q. Is that substantially the complaints that she nade, doctor?

A. That is essentially what she gave me.

Q. And you had no history in your consideration nd examination of fatigability?

A. No, that was not mentioned to me.

Q. And you had no complaint in your history bout nervousness?

A. Not specifically. It was obvious the girl was epressed because of her facial scars.

Q. But you had no history of her conduct as to eing nervous between the accident to the present me? A. She never alluded to such. [184]

Q. So you had no knowledge of that?

A. No.

Q. You had no knowledge of her being irritable?

A. No.

Q. And you didn't have any history of her losing ome twenty-some pounds weight since the accident?

A. Yes, she did mention that she had lost some eight.

Q. Doctor, if you had those additional com-

(Testimony of Dr. Harold V. Petzold.)

plaints they would be significant, wouldn't they, in your evaluation?

A. As a total picture. Probably pertaining to the objective neurological status is another thing.

Q. But I mean, doctor, you evaluate them certainly by clinical signs as well as these neurological electroencephalograms, do you not?

A. Yes, we do.

Q. In other words, a neurological examination also has its limitations, doesn't it, Doctor?

A. Very definitely.

Q. There are large areas of the brain that it doesn't reach, isn't that right?

A. Well, that covers a lot of discussion.

Q. Well, you have the silent areas of the brain that in the medical profession you people don't know what they are for, do you?

A. Well, in answering such a question as that one would have [185] to qualify and state specifically what is indicated and what area is silent, to what degree they are silent, or what.

Q. True. But the neurological examination does not reach them, does it, doctor?

A. I don't believe that question can rightfully be answered.

Q. Is it difficult to answer, doctor, or can't be?

A. I would preface that by the fact that we ought to know what was specifically in mind regarding silent areas.

Q. Well, there are areas of the brain that take

(Testimony of Dr. Harold V. Petzold.)

care of perception, memory. Those are not reached by neurological examination?

A. Areas of the brain of memory?

Q. And perception?

A. We don't know where memory is stored. It is probably stored all over the brain.

Q. That is right. And if a brain had a diffused injury it could disturb those areas, couldn't it, and not show up in the neurological?

A. It is possible, but again all this must be qualified.

Q. Doctor, isn't it very uncertain in medicine?

A. Will you repeat that?

Q. Isn't it very uncertain in medicine.

Mr. Fitzwilliam: I didn't get the question myself.

Mr. Stutsman: Uncertain. [186]

Mr. Fitzwilliam: Isn't what uncertain.

Mr. Stutsman: Well, trying to evaluate that.

A. We have different techniques with which we do try to evaluate those things.

Q. Doctor, you agree with me that the practice of medicine is an art more than a science, or it is an art and a science, both?

A. I think it is a combination of both.

Q. That is why you doctors study so much, so you can interpret these things, isn't that right?

A. Yes, sir.

Q. And with all that study you have your limitations, don't you, Doctor? A. That is right.

(Testimony of Dr. Harold V. Petzold.)

Q. In medicine a lot of things are very mysterious, doctor, aren't they? A. Yes, indeed.

Q. And that is why we have our human limitations, isn't that right, doctor?

A. Yes, we have our limitations.

Q. It appears to us, does it not, so far, that many things are given to us to know, isn't that right? A. I beg your pardon?

Q. I say also at the present time in medicine there are many things about the functions of the human body that are [187] not given to us to know, isn't that right? A. That is correct.

Q. Now, doctor, Mr. Fitzwilliam mentioned about these subjective complaints and that they are solely in the control of the patient. Do you recall that? A. Yes.

Q. Did anything occur in your examination or did anything come to your attention that you had cause to disbelieve Barbara Arramone in anything she told you? A. No, I had not.

Q. And you didn't get the various other symptoms that I have related in addition to headache and dizziness, isn't that right?

A. No, she did not give them to me.

Q. Now, doctor, a concussion of the brain, can you give us a definition of that, please?

A. By a concussion of the brain it is implied that some force has been applied to the head which may consist of acceleration or deceleration of the head, moving or stopped, in which the brain is

(Testimony of Dr. Harold V. Petzold.)

thrown about in its cranial cavity and shakes up the nerves like you shake up a bag of marbles.

Q. In other words, the brain is a sort of jelly substance movable inside the skull, isn't that right?

A. That is correct. There are degrees of concussion.

Q. And there is a fluid substance that surrounds the brain, [188] in between the brain the skull, isn't that right? A. That is correct, yes.

Q. Now, you are aware, from your examination, of the direction of force that hit her head, are you not, from looking at the wounds?

A. That is right.

Q. It was more or less her right face forward, wasn't it? A. That is the way it appeared.

Q. And were you aware also that she struck the windshield so hard that her head went through the glass?

A. I did not know it went through the glass.

Q. But that would be a significant thing to know as to the force of the blow, would it not, doctor?

A. Yes, I think it would.

Q. Now when a head is thrown violently against the glass to the extent that it will knock a hole through the glass, the skull, the outside part of the head, is suddenly decelerated, isn't that right?

A. The head is decelerated.

Q. And then the brain keeps coming, isn't that right? A. That is correct.

Q. And incidentally, in that area of the brain,

(Testimony of Dr. Harold V. Petzold.)

the forepart of the brain, you have some irregular areas of bone right behind the eyes, doctor?

A. They are pretty smooth. [189]

Q. Aren't they those wings where the temple lobes fit into the skull?

A. And they are there for a reason, they protect the brain.

Q. And there are ridges forward, aren't they?

A. That is for the convolutions of the brain to fit in.

Q. And there are those two wings of the bone across behind the eyes, the sphenoid bone, or something? A. The wings of the sphenoid.

Q. And they come out, don't they, doctor?

A. That is correct.

Q. And there are edges across there?

A. There are smooth edges.

Q. But also the bone part is very thin where they come to an edge, isn't that right?

A. Relatively thin. It varies.

Q. And it goes back about probably a half inch, doesn't it?

A. It makes a slight overlying shelf, if you will.

Q. And that is where the brain would hit as it travels forward, wouldn't it?

A. It travels as a mass, the whole brain goes forward.

Q. True, but the part that first hits hits those rough edges, isn't that right, doctor?

A. Well, I don't know.

estimony of Dr. Harold V. Petzold.)

Q. Wouldn't the brain be so large it would have hit them?

A. The brain is moving as a mass, and it is held its [190] position by various contiguous structes, such as the falx, which must be taken into count, that holds the brain in place.

Q. Now, doctor, is what we have just talked here out, this force being applied as we have described, hat consistent with concussion of the brain?

A. Oh, yes, I think that this patient had a conssion of the brain, there is no doubt of that.

Q. And don't you think the electroencephaloam is also consistent with that?

A. I don't believe so.

Q. It isn't consistent with it?

A. I don't believe you could make that statent, no.

Q. Is it inconsistent with it?

A. No, I do not say that you could make that tement either.

Q. It shows abnormality and diffuse injury, esn't it?

A. But it does not say due to what.

Q. No, but it is significant as a diagnostic aid, 't it, doctor? A. It is an aid.

Q. True. And it certainly isn't contrary to a ncussion, is it? A. No, it is not contrary.

Q. Doctor, also it is consistent with a contusion the [191] brain, or bruising, isn't it, doctor?

A. No, it is not that.

(Testimony of Dr. Harold V. Petzold.)

Q. Doctor, a concussion of the brain is a brain injury, isn't it?

A. It is a form of a brain injury, yes.

Q. Doctor, if you agree that Barbara had a concussion of the brain and if you take these symptoms that have been related as true, then she has at the present time a post concussion syndrome, as they call it in medicine, wouldn't you say?

A. I believe that her symptoms in the aggregate would add to that.

Q. And it is organic brain injury, isn't it?

A. Yes, it is attributed to that.

Q. And, doctor, I have your report here. This is your signature, is it not? A. Yes, it is.

Q. And a part of this was not stated. Is this the true diagnosis of the electroencephalogram: Diffused abnormal E.E.G., of mild degree, compatible with a convulsive susceptibility?

A. That is correct.

Q. What does compatible with a convulsive susceptibility mean, doctor?

A. That would mean that if clinically this patient had complained of having convulsions, the record would be compatible [192] with that because it shows paroxysmal dysrhythmia.

Q. Doctor, in convulsive conditions you have the petit mal and grand mal, isn't that right?

A. That is correct.

Q. And petit mal would be of very short duration and probably very minor, isn't that right?

A. Petit mal is an unequivocal diagnosis by the

Testimony of Dr. Harold V. Petzold.)

E.E.G. We know that, and it is the only one that re can diagnose specifically by the E.E.G.

Q. A blackout would be a petit mal, wouldn't it?

A. No, it would not be necessarily.

Q. It could be, couldn't it, doctor?

A. It could be anything. It could be a disturbance of the circulation.

Q. Now, if it is true that Barbara had blackouts, hat would be consistent with this electroencephalogram, wouldn't it, doctor?

A. According to the history of development a month ago, one would try to tie in clinically the gnificance of this.

Q. It would be significant, wouldn't it, doctor?

A. You would have to take that into account.

Q. That is right. In fact, doctor, effects of these rain injuries come on years later, don't they?

A. Some feel that the span of time is anywhere rom a year to ten years. We can't always prove hose things.

Q. So Barbara is in that span, isn't she, right ow? [193]

A. I would say so.

Q. Now, doctor, on Barbara Arramone, you ere primarily concerned on a neurological basis, n't that right? A. That is correct.

Q. You are not a psychiatrist?

A. No, I am not.

Q. You made no attempt to evaluate her on a sychiatric basis?

A. None other than to give her some assurance

(Testimony of Dr. Harold V. Petzold.)

because of her indicated emotional instability because of her scars.

Q. You felt that they were indicated, that is why you gave that to her?

A. Well, I don't like to see them cry in the office.

Q. What is that?

A. I don't like to see them cry in the office.

Q. Is that the reason you gave it to her, not because she needed reassurance?

A. If they don't need it we certainly don't say anything to them.

Q. Well, doctor, as a doctor of medicine wouldn't you say that a young girl suffering disfiguring scars as you saw them, it would have an emotional effect on them?

A. I believe that is correct.

Q. In fact, doctor, in medicine isn't it recognized that facial scarring of people causes various types of anti-social behavior? [194]

Mr. Fitzwilliam: Your Honor please, I am going to object to this. Counsel has already elicited from the doctor——

Mr. Stutsman: I will withdraw the question. He said he gave a little reassurance. I will withdraw that.

Q. Doctor, a little further on that basis could I ask you this: That you have not even, so there will be no doubt about it, attempted to give us any opinion relative to the emotional disturbance result-

(Testimony of Dr. Harold V. Petzold.)

ing from the psychic shock initially when the injury occurred or the disturbance which would necessarily follow, if it did follow, from the disfigurement afterwards? You haven't given any opinion, have you?

A. Now, that doesn't fall within my realm.

Q. So the person best able to give such an opinion would be one trained in psychiatry, would it not, doctor? A. That is correct.

Q. But in medicine generally, even though it is not in your realm, you do recognize psychic injury, don't you, doctor? A. Yes, I do.

Mr. Stutsman: Doctor, I want to thank you very kindly.

Redirect Examination

Mr. Fitzwilliam: Q. Just one question, doctor: There was a mention of petit mal and grand mal, I believe. Petit mal, as I understand it, to try to shorten this, is the [195] shorter periods of convulsion?

A. Yes. Petit mal is a very short transient loss of consciousness, varying anywhere from 1 second to probably 30 seconds, not manifested by any tongue biting, movements of extremities, and so on.

Q. And that is the one type of diagnosis that you say you can depend on in the encephalogram examination?

A. So far as the electroencephalogram is concerned, the wave configuration that is seen in petit mal is the only one that we consider diagnostic.

(Testimony of Dr. Harold V. Petzold.)

Q. And was that type of wave present on this chart?

A. No, this patient did not have petit mal activity.

Mr. Fitzwilliam: All right, thank you very much.

Recross Examination

Mr. Stutsman: Q. Doctor, is it a fact that many known epileptics have a completely normal reading of the electroencephalogram?

A. 15 to 20 per cent of known epileptics will show a normal record.

Q. And incidentally, doctor, how much time did you have with Barbara, that is, taking the history and everything all together?

A. Better than an hour, an hour and ten minutes, perhaps.

Q. And that is the only time you ever saw her?

A. Yes. [196]

Redirect Examination

By Mr. Fitzwilliam:

Q. One question on that, I am sorry. Could you accomplish any more in the way of examination, doctor, by taking any more time?

A. Not so far as the objective neurological examination is concerned. Either the findings are there or they aren't.

Mr. Fitzwilliam: I see. Thank you very much.

Mr. Stutsman: Thank you, Doctor. [197]

Thursday, April 7, 1955, 1:30 p.m.

The Court: The jurors are all present. You may proceed.

Mr. Nagel: Barbara.

BARBARA ARRAMONE

Plaintiff herein, called as a witness in her own behalf, sworn.

Direct Examination

Mr. Nagel: Q. We are going to ask that you speak up loud enough so we can hear you, please. Your name is Barbara Arramone, is that correct?

A. Yes.

Q. You are now 19 years of age?

A. Yes.

Q. And you were 17 at the time you were involved in the collision, is that right?

A. That is right.

Q. You are the daughter of Mary Arramone, who is sitting in the back room here?

A. Yes.

Q. Did your mother give the correct date of your birth, Barbara?

A. I wasn't here then.

Q. When were you born? A. 1935.

Q. And on what day and month? [198]

A. October 20, 1935.

Q. That makes you 19 today, is that correct?

A. Yes.

Q. Barbara, is it true that on August 27, 1953 you had come out to California along with your

(Testimony of Barbara Arramone.)

uncle and aunt, Mr. and Mrs. Brunkala on vacation? A. That is right.

Q. And you left Fresno and was proceeding along the highway to stop at Sacramento and then proceed further on home, is that correct?

A. Yes.

Q. And is it true that you were sitting in the front of the automobile and to the right?

A. Yes.

Q. And right next to your aunt, Mrs. Brunkala, is that right? A. Yes.

Q. Barbara, do you remember anything about the collision itself? A. No.

Q. Were you awake or were you asleep prior to the collision? A. I was asleep.

Q. What is the first distinct recollection you have, Barbara, after the collision took place?

A. When I woke up in the hospital, the nurse was in the [199] room.

Q. You are going to have to speak up a little bit louder, Barbara, please. You woke up in the hospital and what?

A. The nurse was talking to me.

Q. Do you now know how long that was after the collision took place? A. Yes.

Q. How long was that after the collision took place? A. Three days.

Q. After your stay in the San Joaquin Hospital you were then transferred by ambulance to St. Agnes Hospital in Fresno, is that right?

Testimony of Barbara Arramone.)

Q. And you stayed there for some days and hen moved out to your uncle's home?

A. That is right.

Q. That is Mr. and Mrs. Hinkle, is that correct?

A. Yes.

Q. And then some time after that you left for ome, is that correct, Barbara? A. Yes.

Q. With your mother? A. Yes.

Q. And did you see Dr. Pearson in Fresno?

A. Yes, I did.

Q. And Dr. John Wilde? [200]

A. Yes.

Q. And Dr. Wolf? A. Yes.

Q. Barbara, did you lose any teeth in this collision? A. Yes, I did, I lost four teeth.

Q. Can you point them out to us just generally? Were they on the left side of your mouth or right?

A. On the left side.

Q. How many were lost from the top and how many below?

A. Well, at the time of the accident the two top teeth got knocked out, and one on the bottom was cracked and pushed backwards.

Q. And were those later extracted?

A. Yes, sir.

Q. Were any of your other teeth knocked loose?

A. I had two teeth chipped on the right side, nd some teeth jarred loose on the left side, upper nd lower.

Q. And did Dr. Johnson manage to save those eeth that were loose?

(Testimony of Barbara Arramone.)

Q. Were you present at the time we took Dr. Johnson's deposition back in Chicago, Barbara?

A. Yes, sir.

Q. And did he at that time fully relate the number of teeth that were repaired and capped and replaced? A. Yes. [201]

Q. Now, I will ask you this, Barbara: The four teeth that you lost, did you have any cavities in any one of those four teeth prior to the time that you were involved in the collision?

A. No, not so far as I know.

Q. Now, Barbara, some time after you got back home you went back to high school, is that correct?

A. Yes, sir.

Q. And did you get your high school diploma?

A. Yes, I did.

Q. And some time after that did you start working? A. Yes, I did.

Q. And that was for the telephone company, was it? A. Yes.

Q. What kind of work did you do?

A. Well, I started out as a clerk-typist.

Q. A clerk-typist, is that correct?

A. Yes.

Q. And you worked some five and a half months, is that right? A. Right.

Q. And you earned how much money?

A. About——

Q. Was it $1200.00?

A. It was $1200.00 for the five and a half months.

Testimony of Barbara Arramone.)

Q. Barbara, why did you terminate your employment after some [202] five and a half months?

A. Because of my ill health and because I——

Witness weeps.)

Q. Well, Barbara, let me ask you this——

The Court: Do you feel all right, Barbara? We ill take a recess at this time.

Ladies and gentlemen of the jury, we will stand recess. You will remember the admonition of the ourt heretofore given.

(Recess.)

The Court: The jurors are all present. You may roceed.

Mr. Nagel: Your Honor, we have no further uestions of Barbara.

Cross Examination

Mr. Fitzwilliam: Q. Barbara, you are nervous n the witness stand, aren't you?

A. Yes, a little.

Q. Now, you don't have to worry about me. You emember you talked to me in my office last Thursay for oh, better than a half hour, with the court eporter there? A. Yes, sir.

Q. And we got along all right, didn't we?

A. Yes, sir.

Q. You didn't have any trouble. Barbara, I am oing to ask you this: Do you remember what the eating arrangement was in the [203] rear seat of he automobile?

(Testimony of Barbara Arramone.)

A. Yes, sir. My girl friend was on the right hand side directly behind me, and little Jennifer was on the left hand side of the car in back of her father.

Q. Now you went to high school, back to high school, in October? A. That is right.

Q. All right. And then you went to work about March, was it, of last year? A. Yes.

Q. And what date was it you got of high school? Was it in February?

A. No, I think it was January 28th.

Q. January 28th. And when you left Fresno, Barbara, and went home, how did you go to the train? Did you walk or go by car?

A. No, my uncle drove me to the train.

Q. Your uncle took you to the train?

A. Yes.

Q. You don't have any trouble remembering those details about how they were seated in the rear seat of the car and about your uncle taking you to the train?

A. No, I can't forget about the seating arrangement because we always sit that way.

Q. And can you recall now the day that you graduated from [204] high school, January 28th?

A. I think it was the 28th.

Q. And you haven't had any plastic, any further plastic work done now since last October?

A. No.

(Testimony of Barbara Arramone.)

Q. And you remember pretty well what Dr. Johnson said in his deposition about your teeth that were taken some seven or eight months ago?

A. I couldn't help to remember that, I was looking so much while the teeth were being fixed, I know in almost every detail.

Q. And Barbara, I assume that you have been nervous about this lawsuit, haven't you?

A. Somewhat, yes.

Mr. Fitzwilliam: I think that is all. Thank you.

A. You are welcome.

Mr. Nagel: No questions. Step down, Barbara.

Mr. Stutsman: May we have one second, for a conference, your Honor please?

The Court: You may.

Mr. Stutsman: We rest our case, if the Court please.

Mr. Pacht: The Plaintiff Brunkala rests.

The Court: All the Plaintiffs then rest?

Mr. Nagel: Yes, your Honor. [205]

[Endorsed]: Filed Dec. 5, 1955.

[Endorsed]: No. 14911. United States Court of Appeals for the Ninth Circuit. Barbara Arramone, a minor, by and through her guardians ad litem, Dominick N. Arramone and Mary I. Arramone, Appellants, vs. John A. Prowse, as administrator of the Estate of Alvin Prowse, also known as Alvin

I. Prowse, deceased, Appellee. Transcript of Record. Appeal from the United States District Court for the Northern District of California, Northern Division.

Filed: October 24, 1955.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 14911

BARBARA ARRAMONE, a minor, by and through DOMINICK N. ARRAMONE, Etc., et al.,
Plaintiffs,

vs.

JOHN A. PROWSE, as Administrator of the Estate of ALVIN PROWSE, Etc.,
Defendants.

ADOPTION OF DESIGNATION OF CONTENTS OF RECORD AND STATEMENT OF POINTS ON APPEAL

Pursuant to Rule 17 (6) of the Rules of Practice of United States Court of Appeals for the Ninth Circuit, the Plaintiff and Appellant, Barbara Arramone, a minor by and through her Guardians

ad Litem, Dominick N. Arramone and Mary I. Arramone, hereby adopts the statement of points on appeal and designation of contents of record on appeal heretofore filed in the District Court of the United States in and for the Northern District of California, Northern Division, in proceeding No. 7007 appearing in the typewritten transcript of record as the statement of points and the designation of contents of record on appeal as provided in said Rule 17 (6).

Dated: This 21st day of October, 1955.

STUTSMAN, HACKETT & NAGEL,

/s/ By J. J. NAGEL,

Attorneys for Plaintiff-Appellant,
Barbara Arramone

Affidavit of Service by Mail attached.

[Endorsed]: Filed October 22, 1955. Paul P. O'Brien, Clerk.

No. 14,911

United States Court of Appeals

For the Ninth Circuit

BARBARA ARRAMONE, a minor, by and through her guardians ad litem, Dominick N. Arramone and Mary I. Arramone,

Appellant,

vs.

JOHN A. PROWSE, as administrator of the Estate of Alvin Prowse, also known as Alvin I. Prowse, Deceased.

Appellee.

Appeal from the United States District Court for the Northern District of California, Northern Division.

OPENING BRIEF OF APPELLANT BARBARA ARRAMONE.

GERALD W. STUTSMAN,
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OPENING BRIEF OF APPELLANT BARBARA ARRAMONE.

JURISDICTION.

Appellant sued for damages for personal injuries received in a vehicle collision on August 27, 1953, in California and her parents sued for medical expenses furnished by appellant, by action commenced in the District Court of the United States in and for the Northern District of California, Northern Division, on March 17, 1954 (pages 7 to 11 Clerk's Transcript), within the time allowed by law.

All parties plaintiff were citizens of the State of Illinois and all parties defendant were citizens of the State of California and the amount in controversy, as to each cause of action, exclusive of interest and costs, exceeded Three Thousand Dollars ($3,000.00) (pages 6 and 9 Clerk's Transcript). The jurisdiction of the District Court rested on 28 U.S.C.A., Section 1332.

Verdicts were rendered in favor of appellant for Six Thousand Dollars ($6,000.00) and in favor of her parents for Four Thousand Dollars ($4,000.00) and judgment was entered for Ten Thousand Dollars ($10,000.00) together with costs in the sum of Three Hundred Four Dollars and 99/100 ($304.99) (pages 13 to 15 Clerk's Transcript). After hearing of appellant's motion for a new trial an order denying plaintiff's motion for new trial was made and entered on July 12, 1955 (pages 16 and 17 Clerk's Transcript). Notice of appeal from this order was filed August 10, 1955 (page 18 Clerk's Transcript). The jurisdiction of this court is invoked under 28 U.S.C.A., Section 2106.

QUESTIONS PRESENTED.

The questions raised are: (1) Whether a jury's fail-re to award a plaintiff personal injury litigant ade-uate damages constitutes a ground for awarding the laintiff a new trial; and (2) Where the damages varded a plaintiff personal injury litigant by a jury re grossly inadequate does the refusal of the court to ward plaintiff a new trial amount to such an abuse discretion as to constitute error of law.

STATEMENT OF CASE.

On August 27, 1953 the appellant, Barbara rramone, a minor, seventeen years of age, received ajuries resulting from the collision of an automobile perated by Joseph R. Brunkala, in which appellant as riding as a passenger, and a pick up truck owned nd operated by Alvin Prowse, also known as Alvin Prowse, deceased.

The collision occurred as the result of the negligence f the said Alvin Prowse also known as Alvin I. Prowse, and took place at the intersection of U.S. Highway 99 at California State Route 88, also known s Waterloo Road, public highways in the County of an Joaquin, State of California.

Subsequent to the collision, the aforesaid Alvin Prowse, also known as Alvin I. Prowse died, and on he 15th day of October, 1955 John A. Prowse was ppointed administrator of the estate of the said Alvin Prowse, also known as Alvin I. Prowse, deceased,

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rowse, also known as Alvin I. Prowse, deceased,

pursuant to order of the Superior Court of the State of California in and for the County of Calaveras, in estate proceeding No. 2639.

On January 14, 1954, by order of the District Court of the United States, in and for the Northern District of California, Northern Division, in proceeding No. 7007, an order was made and entered appointing Dominick N. Arramone and Mary I. Arramone, appellant's parents, as guardians ad litem of appellant for the purpose of instituting suit against John A. Prowse, as administrator of the estate of Alvin Prowse, also known as Alvin I. Prowse, deceased, and other nominal defendants.

Thereafter a suit was commenced, being action No. 7007, in the District Court of the U.S. in and for the Northern District of California, Northern Division, by the appellant Barbara Arramone, a minor, by and through her guardians ad litem Dominick N. Arramone and Mary I. Arramone, as a plaintiff to recover damages for the injuries suffered by appellant as the result of the negligence of the said Alvin Prowse, also known as Alvin I. Prowse, deceased and said Dominick N. Arramone and Mary I. Arramone joined in said suit, individually, as parties plaintiff to recover damages incurred by themselves for hospital, medical, dental, x-rays, drugs and allied expenses furnished appellant in connection with the injuries sustained by her in said collision.

After trial of the issue, and on the 8th day of April, 1955, the jury returned a verdict in favor of the plain-

f and appellant Barbara Arramone and assessed
mages against the defendant John A. Prowse, as
ministrator of the estate of Alvin Prowse, also
own as Alvin I. Prowse, deceased, in the sum of
,000.00 (page 13 Clerk's Transcript); the jury also
turned a verdict in favor of the plaintiffs Dominick
Arramone and Mary I. Arramone against the de-
ndant John A. Prowse, as administrator of the es-
te of Alvin Prowse, also known as Alvin I. Prowse,
ceased, in the sum of $4,000.00 (page 14 Clerk's
anscript).

On the 13th day of April, 1955 judgment was en-
red in favor of plaintiff and appellant Barbara Ar-
mone and the plaintiffs Dominick N. Arramone and
ary I. Arramone in the total sum of $10,000.00 to-
ther with costs in the sum of $304.99 (pages 14 and
Clerk's Transcript).

Subsequently, on the 14th day of April, 1955 plain-
ffs filed their notice of motion for new trial as to
e plaintiff and appellant Barbara Arramone on the
llowing grounds: (1) that the verdict was against
e weight of the evidence; and (2) That inadequate
mages were awarded the plaintiff, Barbara Ar-
mone (page 16 Clerk's Transcript).

After argument of the motion for new trial the
onorable Sherrill Halbert, United States District
idge, on the 12th day of July, 1955 made and caused
be entered an Order Denying Plaintiffs' Motion for
New Trial (page 17 Clerk's Transcript).

That it is from the District Court's Order Denying Plaintiffs' Motion for a New Trial that this appeal was prosecuted pursuant to Notice of Appeal filed by plaintiff, Barbara Arramone, by and through her guardians ad litem, Dominick N. Arramone and Mary I. Arramone (page 18 Clerk's Transcript).

STATEMENT OF POINTS TO BE URGED.

Appellant's statement of points is set forth in the record (pages 21 and 22 Clerk's Transcript). Simply stated, appellant contends that the damages awarded her by the jury were grossly and patently inadequate and that the trial court's order denying her motion for a new trial amounted to such an abuse of discretion as to constitute error of law.

ARGUMENT.

INTRODUCTION AND SUMMARY.

I. THE DAMAGES AWARDED PLAINTIFF-APPELLANT, BARBARA ARRAMONE, BY THE JURY ARE INADEQUATE.

An examination of the record concerning the nature and extent of the injuries suffered by appellant can lead but to one conclusion and that is that the damages awarded to her by the jury's verdict in the sum of $6,000.00 are grossly inadequate.

This is made more apparent when it is observed that the damages awarded to her parents, Dominick N. Arramone and Mary I. Arramone, by the jury for

resent and prospective hospitalization, medical, den-
l and other allied expenses was in the sum of
,000.00, this being full payment for all actual
amages.

That the nature and extent of the injuries suffered
the appellant are as follows:

That on or about the 27th day of August, 1953, the
ppellant Barbara Arramone, a minor, was involved
a vehicle accident near the environs of Stockton,
alifornia. That as a consequence of the accident her
ace and head were forceably thrust through the wind-
hield of the vehicle in which she was riding as a
assenger and she was thereby seriously injured, ren-
ered unconscious for a period of approximately two
ays, originally hospitalized in the San Joaquin Gen-
al Hospital in Stockton, California for approxi-
ately 7 days, and in the St. Agnes Hospital in
resno, California for approximately 4 days (pages
, 31, 46, 47, 128, 185 and 191 Clerk's Transcript).

That as a result thereof appellant suffered multiple
evere facial lacerations leaving scars which are dis-
guring by all standards of measurement (page 72
lerk's Transcript).

That the scars involved the forehead, upper right
yelid, left frontal area of the head, nose, left side
f her face, lower right chin and lip and left side of
er face. That as of October 8, 1953, the scars varied
n length from a minimum of one inch to a maximum
f four and one-half inches, and varied in width from
ne-eighth of an inch to one inch (pages 30, 71, 75,
6 and 77 Clerk's Transcript).

That a picture portraying appellant's facial condition approximately six months prior to the collision was introduced into evidence as Exhibit 21 (page 44 Clerk's Transcript); that three pictures portraying appellant's facial condition subsequent to the collision were introduced into evidence as Plaintiff's Exhibits 23, 24 and 25 (page 46 Clerk's Transcript); that three additional photos portraying the nature of appellant's facial injuries were introduced into evidence as Plaintiff's Exhibits 39, 40 and 41 (pages 73 and 74 Clerk's Transcript).

That plastic surgery comprising excising of the old scars and wide undermining of adjacent tissue was performed to reduce the scars on October 19, 1954 at St. Luke's Hospital in Chicago; that the plastic surgery required the making of a total of 185 suture stitches with 6-0 nylon on the surface portions of the face, chin, head and nose, and two catgut sutures inside the nose and this latter surgery involved shortening of the nose; that the surgery required three hours to perform and involved five days hospitalization, from October 19, 1954 to October 23, 1954 (pages 77, 78, 79 and 80 Clerk's Transcript); that the scars show up more in cold weather and when appellant is fatigued (pages 63 and 64, Clerk's Transcript).

The examination as of October 12, 1953 revealed the loss of 4 teeth, including the upper left cuspid, upper left bicuspid, lower left central and lower left lateral and the cracking of two teeth including the right first bicuspid and lower right bicuspid; that 4 to 6 teeth adjacent to areas of the missing teeth were trauma-

zed; that the loss of the left upper cuspid and bi-
ıspid necessitated the crowning of the left lateral and
e left second bicuspid teeth and bridging of the
wer left central and lateral teeth necessitated the
owning of the lower right central and lower left
ıspid teeth; that the fracture of the upper right
st bicuspid and the lower right bicuspid were par-
ally replaced by crowns; that all of the missing
eth were normal prior to the accident and all teeth
ere normal and in good condition eight months prior
the accident; that a total of 41 treatments were
ndered appellant relative to replacement of the
issing teeth and repair of the damaged teeth (pages
, 89, 90, 94, 95, 96, 98 and 102 Clerk's Transcript).

That x-rays portraying the condition of appellant's
eth were introduced into evidence as Plaintiff's Ex-
bits Nos. 42, 42-a and 42-b (pages 92 and 93 Clerk's
ranscript).

That appellant suffered brain concussion resulting
a post concussion syndrome manifested by symp-
ms of dizzy spells, blackouts, loss of power of con-
ntration, forgetfullness, fatigue, constant buzzing in
ars, experiencing of bad odors, loss of weight, loss
appetite and constantly increasing headaches
pages 59, 60, 62, 63, 117, 118, 120, 121, 186, 187 and
93 Clerk's Transcript); that the concussion suffered
y appellant amounted to an actual brain injury
pages 133 and 194, Clerk's Transcript).

That there was damage to the nerve supplying the
pper right eyelid from scarring or because it was
riginally damaged and then degenerated resulting in

a mechanical block which prevents closure of the eyelid in repose and sleep and results in irritation because of inability to blink the eyelid and keep the conjunctiva and cornea moist (pages 57, 80, 161 and 162 Clerk's Transcript).

That appellant suffered a chip fracture of the distal portion of the ulna bone of the left wrist leaving it very tender and painful especially on flexion which involved development of a nodule (pages 151, 154, 157 and 158, Clerk's Transcript).

That an x-ray portraying the chip fracture of the ulna bone was introduced into evidence as Plaintiff's Exhibit No. 43 (page 156 Clerk's Transcript).

That appellant suffered laceration of the right knee cap necessitating suture, and resulting development of scar tissue which makes the knee extremely painful on use or flexion (pages 50, 151 and 154 Clerk's Transcript).

That appellant suffered laceration of the right knee cap necessitating suture, and resulting development of scar tissue which makes the knee extremely painful on use or flexion (pages 50, 151 and 154 Clerk's Transcript).

That a picture portraying the injuries to appellant's knee was introduced into evidence as Plaintiff's Exhibit No. 22 (page 45 Clerk's Transcript).

That the laceration of the left cheek of appellant resulted in complete severance of the seventh nerve causing inability to smile, numbness on the left side of the face and a twitching or involuntary jerking

f the facial muscles (pages 29, 67, 118, 126, 152 and 30 Clerk's Transcript).

That appellant veers constantly to the right when alking and is lacking in balance and coordination, as weakness in muscle of left forearm and muscle hich rotates the head to left, with partial atrophy f muscle of left forearm (pages 61, 62, 123 and 124 lerk's Transcript).

That appellant has lost interest in social life and oesn't take an interest in very much of anything pages 53, 54, 59 and 118, Clerk's Transcript); that ie suffered embarrassment, humiliation and anguish ue to her facial disfigurement (pages 54, 55, 133, 134, 52, 153, 187, 195 and 196 Clerk's Transcript); that ie loves to sit in the dark by herself and pulls the indow shades down in the house during the day or ight, which tendency was getting worse at time of rial (pages 55 and 56 Clerk's Transcript); that alhough appellant was formerly a sound sleeper, she as become a restless sleeper and subject to having ightmares which condition has become worse with ie passage of time (pages 58 and 63 Clerk's Transcript).

That appellant had psychic trauma and personality hange which has transformed her from a happy dispositioned girl to one who is nervous, irritable and oody, and who is subject to hallucinations, insomnia nd emotional instability (pages 116, 118, 119, 120, 21, 133, 134, 154, 162 and 163 Clerk's Transcript).

That appellant suffered injuries rendering her unble to breathe freely and involving olfactory nerve

damage (pages 58, 59, 118, 125 Clerk's Transcript); that appellant suffers ill health and has been rendered unable to perform many types of work and has lost social interests as well as interest in pursuing educational advancement (pages 51, 53, 61, 118, 119 and 203 Clerk's Transcript); that prior to the collision and sustaining of injuries appellant was a normal, friendly type of individual who enjoyed school, social activities, sports and church, and was not nervous, but studious and noncomplaining, who made good grades in school and was desirous of becoming a dental nurse (pages 53 and 116 Clerk's Transcript); that her normal weight was 116 to 117 pounds (page 59 Clerk's Transcript); that the most serious physical ailments with which appellant had been confronted prior to the collision, were colds, with the exception of one period of hospitalization for a tonsillectomy (pages 166 and 167 Clerk's Transcript).

That past and future plastic surgery cannot effect more than 75 per cent recovery or eliminate less than 25 per cent total cosmetic disability (page 80 Clerk's Transcript); that there will be permanent paralysis of the left facial nerve with resulting inability to smile; that there will be permanent inability to close the right eyelid (pages 80, 136 and 161 Clerk's Transcript); that reducing or crowning of teeth does not prolong, but shortens their lifespan (page 101 Clerk's Transcript); that there is permanent paralysis of the left facial muscle (page 128 Clerk's Transcript); that appellant will suffer emotional defects for the rest of her life or at least for many years (page 136

lerk's Transcript); that there is probable injury the brain which may be stationary or which may rogress, concussion syndrome with blackout spells id possible deterioration which will not recede, which ay be stationary or may progress and get worse ages 136 and 137 Clerk's Transcript); that the orig- al psychic trauma will never be wiped out (page 140 lerk's Transcript); that the headaches will be per- anent (page 164 Clerk's Transcript); that further astic surgery is deemed necessary to effect a greater egree of cosmetic recovery (pages 80, 81, 82, 83 and 3 Clerk's Transcript); that further psychic therapy indicated and if obtained it would require five to n years to stabilize appellant since the impact of e psychic trauma is more severe on a girl of 17 18 years of age than on an older person (pages 4, 135, 136 and 165, Clerk's Transcript); that rther treatment of the left wrist and right knee is dicated (page 163 Clerk's Transcript).

There is no substantial conflict in the evidence lative to the extent of the injuries suffered by ppellant, Barbara Arramone. The only conflict in e evidence relates to the evaluation of certain of the eurological tests made by Drs. Walter Bromberg and arold C. Petzhold; the remainder of the medical vidence submitted in behalf of the appellant stands ncontradicted.

In view of the discrepancy between the damages varded appellant's parents, and those awarded ap- ellant, it is obvious that the jury's verdict is so

inadequate an award that it must have been rendered under passion, prejudice or compromise.

In *Macias, et al. v. Western Union Telegraph Co., et al.,* 83 Federal Supplement 492, the United States District Court for the Southern District of California, Central Division, granted a new trial to plaintiffs, a minor child and parents, for inadequacy of damages for personal injuries where the jury had rendered a verdict in the sum of $1,000.00 for the injuries to the minor, and $150.00 to the parents for damages by way of expenditures.

The Court stated at page 494:

> "I need not speculate as to what was in the minds of the jurors in making this wholly inadequate award when, by their verdict for expenditures they showed that they believed the parents. Perhaps, as indicated at the hearing, they may have misunderstood the instructions as to the responsibility of the defendant for the action of its employee, Preston Williams, in parking an automobile on an incline without taking proper precautions to prevent it from rolling down the street and hitting the child. Or, perhaps, the jury misunderstood the instructions of the Court as to the elements to be considered in awarding general damages, especially for pain and suffering which, in a child, may be as keen as in an adult, despite the proverbial ability of children to overcome quickly mental and physical hurts."

I. THE COURT ERRED IN REFUSING TO GRANT A NEW TRIAL ON THE GROUND THAT THE DAMAGES AWARDED PLAINTIFF-APPELLANT, BARBARA ARRAMONE WERE INADEQUATE AS A MATTER OF LAW.

By way of prefacing this argument appellant wishes to call attention to the fact that the same rules are to be applied in determining whether damages awarded are inadequate or excessive.

As is pointed out in a recent and exhaustive annotation on adequacy of award in personal injury cases in 16 A.L.R. 2d 393 at pages 400 and 401,

> "It is now generally recognized, contrary to the earlier rule, that a plaintiff who has been awarded an inadequate verdict is as well entitled to relief as a defendant who suffers from one which is excessive."

This rule finds support in federal authority as early as 1896. See *Berry v. Lake Erie and W. R. Co.,* 72 Fed. 488 at page 489.

In *Virginia Ry. Co. v. Armentrout,* 166 Fed. 2d 400, a Fourth Circuit Court of Appeals decision, plaintiff, a minor, had suffered loss of his hands as well as portions of both of his arms and a jury returned a verdict in the sum of $160,000.00 on the third trial of the matter. This verdict the trial Court refused to set aside as being excessive and one of the issues presented on review was as to whether or not there was an abuse of discretion in refusing to set aside the verdict as excessive. The Circuit Court so found, reversing the trial Court.

In holding that the trial Court had erred, the Circuit Court stated at page 407,

> "And quite apart from the error in the charge, we think the trial judge erred in refusing to set aside the verdict as excessive and grant a new trial. Ordinarily, of course, the amount of damages is for the jury, and whether a verdict should be set aside as excessive is a matter resting in this discretion of the trial judge. This, however, is not an arbitrary but a sound discretion, to be exercised in the light of the record in the case and within the limits prescribed by reason and experience; and where a verdict is so excessive that it cannot be justified by anything in the records or of which the court can take judicial notice, it is the duty of the judge to set it aside. Failure to do so is an abuse of discretion, analogous to error of law, and as such reviewable on appeal."

Commenting upon the power and duty of a trial judge to set aside a verdict under such circumstances the Court states at page 408,

> "The power and duty of the trial judge to set aside the verdict under such circumstances is well established, the exercise of the power being regarded as not in derogation of the right of trial by jury but one of the historic safeguards of that right. Smith v. Times Pub. Co., 178 Pa. 481, 36 A. 296, 35 L.R.A. 819; Bright v. Eynon, 1 Burr. 390; Mellin v. Taylor, 3 B.N.C. 109, 132 Eng. Reports 351. The matter was well put by Mr. Justice Mitchell, speaking for the Supreme Court of Pennsylvania in Smith v. Times Pub. Co., supra, 178 Pa. 481, 36 A. 298, as follows: 'The authority of the common pleas in the control and revision of excessive verdicts through the means of new trials was firmly settled in England before

the foundation of this colony, and has always existed here without challenge under any of our constitutions. It is a power to examine the whole case on the law and the evidence, with a view to securing a result, not merely legal, but also not manifestly against justice,—a power exercised in pursuance of a sound judicial discretion, *without which the jury system would be a capricious and intolerable tyranny,* which no people could long endure. This court has had occasion more than once recently to say that it was *a power the courts* ought to exercise unflinchingly'. (Italics supplied)

To the federal trial judge, the law gives ample power to see that justice is done in causes pending before him; and the responsibility attendant upon such power is his in full measure. While according due respect to the findings of the jury, he should not hesitate to set aside their verdict and grant a new trial in any case where the ends of justice so require. Aetna Casualty & Surety Co. v. Yeatts, 4 Cir., 122 F.2d 350.

(17) The power of this court to reverse the trial court for failure to exercise the power, where such failure, as here, amounts to an abuse of discretion, is likewise clear. It is true that under section 22 of the Judiciary Act of 1789, 28 U.S.C.A. §879, there may be no reversal on writ of error for any error in fact; and this rule has been frequently applied where reversal is sought because damages are excessive or inadequate. Fairmont Glass Works v. Cub Fork Coal Co., 287 U.S. 474, 53 S. Ct. 252, 77 L. Ed. 439. We do not understand the rule to have application, however, in those exceptional circumstances

> where the verdict is so manifestly without support in the evidence that failure to set it aside amounts to an abuse of discretion. In a situation of that sort, reversal is no more based on 'error in fact' than reversal for refusal to direct a verdict for insufficiency of evidence. Whether there has been an abuse of discretion is a question of law in the one case, just as is the legal sufficiency of the evidence in the other. An appellate court is not required to place the seal of its approval upon a judgment vitiated by an abuse of discretion."

In *Southern Pacific Co. v. Guthrie,* 186 Fed. 2d 926, a Ninth Circuit Court of Appeals decision, which was a rehearing of the same case reported in 180 Fed. 2d 295, plaintiff, a man of fifty-eight years, had suffered the cutting off of his right leg between the knee and hip and recovered a $100,000.00 verdict. The Court on rehearing limited its consideration to the issue of excessiveness and determined that they could not reverse the action of the District Court in denying a motion for new trial on excessiveness, the majority of the Court feeling the size of the verdict was not such as could be characterized as being grossly excessive or monstrous.

The Court did, however, put its seal of approval on the *Armentrout* case, supra, and clearly indicated that had it been able to characterize the particular award as grossly excessive it would have applied its own rule, previously established in *Department of Water and Power v. Anderson,* 95 Fed. 2d 577. See page 586 where the Court states:

"Appellant also contends that the verdict was excessive. Although it was held in Southern Ry. Co. v. Montgomery, 5 Cir., 46 F. 2d 990, 991, that a circuit court of appeals has 'no jurisdiction to correct a verdict because it is excessive', the rule in this Court is that the refusal to grant a new trial is 'such an abuse of discretion as is reviewable by this court' where the verdict is 'grossly excessive'."

What has been determined with respect to grossly cessive verdicts is just as applicable to grossly adequate verdicts, as previously discussed.

That the inadequacy of the award to appellant rein is so monstrous as to shock the conscience pears undebatable and if examined in the light of e nature and extent of her injuries, her past and ture pain, suffering and humiliation, the resistice of her residual physical and psychic injuries to erapy, the $6,000.00 awarded her pales into insigficance and can only exemplify an award which patently grossly inadequate.

What was said by the Court in the *Armentrout* se, supra, with respect to a common sense approach assessing damages with respect to whether one ffering deprivation of a member in infancy is likely feel the same sense of humiliation as one who stains the loss in later life, is certainly not plicable to appellant, for she had the greatest of isfortunes to suffer her injuries just as she was proaching the threshold of womanhood.

Appellant, too, was a minor of the age of seventeen ears when she sustained her injuries. She was, in

addition, at that age when the grotesque nature of her injuries were most physically and psychically overwhelming and excruciating. Furthermore, the residual aspects of her injuries, both physically and psychically, as clearly pointed out in the evidence, will remain with her for many years to come and as to certain particulars, for life.

The rule was stated in the *Macias* case, supra, at pages 492 to 493:

> "When a minor barely five years old is before the Court through his guardian ad litem, appointed by the Court, the responsibility of the Court as to the verdict is greater than in ordinary cases. It follows that the verdict of a jury in such a case calls for a greater scrutiny than the verdict against an adult. This also flows from the fact that in case of a settlement without trial, the settlement would have to be approved by the Court, and that the payment of attorney's fees out of any settlement or award would also be subject to the sanction of the Court. California Probate Code, sec. 1530a; In re Guardianship of Carlon, 1941, 43 Cal. App. 2d 204, 110 P. 2d 488."

In *Cunningham v. State,* 32 N.Y.S. 2d 275, which is comparable to the subject case, plaintiff, a nineteen year old college girl, suffered numerous serious injuries including permanent facial disfigurement and was awarded $25,000.00 damages and her father was awarded $5,000.00 for care and medical attention. On appeal, in *Cunningham v. State,* 34 N.Y.S. 2d 903, the Court determined that the damages allowed were inadequate to compensate such extensive injuries and raised the award to $40,000.00.

CONCLUSION.

Examined in the light of the foregoing authorities, s evident that the damages awarded appellant by jury were inadequate; that the damages awarded were in fact so grossly inadequate as to shock conscience; that the trial Court abused its discre- n in refusing to grant her motion for a new trial that the trial Court's order refusing to grant new trial amounts to error in law and the cause uld be remanded and a new trial ordered.

Dated, Fresno, California,
March 5, 1956.

Respectfully submitted,

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Attorneys for Appellant
Barbara Arramone.

No. 14,911

United States Court of Appeals

For the Ninth Circuit

BARBARA ARRAMONE, a minor, by and through her guardians ad litem, Dominick N. Arramone and Mary I. Arramone,

Appellant,

vs.

JOHN A. PROWSE, as administrator of the Estate of Alvin Prowse, also known as Alvin I. Prowse, Deceased,

Appellee.

Appeal from the United States District Court for the Northern District of California, Northern Division.

ANSWERING BRIEF OF APPELLEE.

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Appellee.

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ANSWERING BRIEF OF APPELLEE.

JURISDICTION.

Statement under this caption in appellant's opening ef is adopted by appellee.

QUESTIONS PRESENTED.

Appellee has no reason to present any further ques- ns in addition to those presented by appellant.

STATEMENT OF CASE.

Appellee adopts the statement under this caption as contained in appellant's opening brief.

STATEMENT OF FACTS RELATIVE TO APPELLANT'S INJURIES AND DAMAGE.

Appellant was involved in an automobile accident at about 2:00 p.m. on August 27, 1953. The injuries sustained by appellant were primarily facial lacerations and loss of four teeth. Immediately following the accident she was taken to the San Joaquin Hospital. There is no notation of any unconsciousness in the records of the San Joaquin Hospital (P Ex 11) and appellant was definitely conscious at 9:00 a.m. on August 28, 1953 (CT p. 26 and 27), and on that date was quite alert and had a visitor, which circumstance did not disturb her; and on August 29 was quite alert, very cooperative with no complaints other than the penicillin shots (P Ex 11) (CT p. 141 and 143); and on August 30 was eating well and was cheerful and cooperative (P Ex 11) (CT p. 35); and by the time of discharge from the San Joaquin Hospital on September 2, 1953—six days after the accident—was quite comfortable and offered *no* complaints and was reading most of the time and had visitors (P Ex 11) (CT p. 35). During the time that appellant was in the San Joaquin Hospital there were no complaints or symptoms to indicate the necessity for any x-rays and none were taken (CT p. 34 and 36). A neurological examination performed at the

n Joaquin Hospital was negative (CT p. 32), and re were no complaints by plaintiff at the San aquin Hospital to indicate brain damage and there s no concern by her physician in this regard (CT 37), and the records of the San Joaquin Hospital note the absence of headaches during appellant's y at that institution (CT p. 37).

On September 2, 1953 appellant was removed to esno, California where she spent four days in the Agnes Hospital (CT p. 46 and 47). There is no ord of any treatment in the St. Agnes Hospital, l no record that there was the necessity for any ays or that any were taken, nor is there any record any evidence of treatment for any brain damage. pellant was able to pose for a photograph while St. Agnes Hospital (CT p. 45) (P Ex 22). On ving St. Agnes Hospital, appellant lived with her le in Fresno (CT p. 201) until September 30, 1953, which time she returned to Chicago by train (CT 47) and she returned to high school in October, 53 to finish her senior year (CT p. 51). She earned diploma and was graduated from high school on nuary 28, 1954 (CT p. 202 and 204). Some time er the appellant obtained a position as a clerk-pist for the telephone company in Chicago and rked five and one-half months; at the end of which ne, and on October 19, 1954, she underwent three urs of plastic surgery, at which time she was hos-alized for four days (CT p. 77 and 80). She has t been hospitalized since, but apparently did not urn to work because of the impending trial for

which she arrived in Sacramento in the month of March, 1955.

Shortly after arriving in Chicago in October, 1953, and on October 12, 1953, appellant reported to her regular dentist in Chicago who repaired four missing teeth with two permanent bridges consisting of two teeth each (CT p. 88, 94 and 95). During this dental treatment, five cavities not caused by the accident were also repaired (CT p. 106 and 107).

The record discloses the following evidence as to each of the injuries that the appellant *claims*:

A. Facial Scars: More than one year *after* the taking of the photographs of the appellant that were introduced into evidence (P Ex 23, 24, 25, 39, 40 and 41), and five and one-half months before the jury was able to view the appellant throughout the course of the four day trial, plastic surgery was performed on the appellant by a highly qualified specialist in Chicago, Illinois (CT p. 77). The scar in the central portion of the appellant's forehead and one just below this one were excised *completely* and closed *without* tension (CT p. 78). The scar arising from the left angle of the mouth, which severed the 7th nerve, was excised and before it was closed a Z-plasty was injected, thus eliminating the distortion from the left angle of the mouth (CT p. 78). The scar on the right half of the chin was excised and the flap was thinned, thereby minimizing the thickened appearance, after which the flap was reinserted (CT p. 79). The final scar, the one on the dorsum of the nose, was repaired without placing any tension on the skin

ges by shortening of the nose which permitted *an fective cosmetic closure of this wound* (CT p. 79 and). The plastic surgery thus performed constituted *75 percent* improvement cosmetically (CT p. 80). few more things remaining to be done (which had t yet been done at the time of trial) will effect a eater degree of cosmetic recovery (CT p. 80 and). The passage of time itself will also cause even ore improvement (CT p. 84).

B. Teeth: As to the replaced teeth, the record dis- ses that in addition to the replaced bridges, a few ner teeth were "traumatized" but were all vital (CT 97), and there was no further evidence of any aumatization in the teeth as of April, 1954 (CT p. 9), at which time all of these teeth were normal d vital. Any traumatized teeth are now beyond the age of having anything further occurring of a detri- ental nature (CT p. 98). Since the installation of e bridges the appellant's bite is normal by all dental andards (CT p. 110).

C. Chip Fracture of Left Ulnar Process: A frac- re to the left wrist of the appellant, if it existed at , was no more than a small chip fracture of the *yloid process* of the ulnar bone. (The appellant is ght handed.) (CT p. 168) (P Ex 43). There were symptoms subjective or objective of any injury the left wrist while the appellant was in the San aquin Hospital (CT p. 34). There was no com- aint by appellant as to her wrist until at some un- ecified date, after appellant had returned to Chi- go, when appellant was picking up a kettle to make

some tea she dropped the kettle and stated "mother, my wrist!" (CT p. 49). The first x-rays of the wrist were in November, 1953. A cast was never applied. One x-ray picture of the wrist failed to disclose *any* bone pathology (CT p. 169 and 170). No x-ray pictures were ever taken subsequent to November, 1953, and the chip fracture of the styloid process perhaps became entirely dissolved (CT p. 170).

D. Laceration of Right Knee: A laceration of the right knee (at times referred to in the record as left knee) was a *superficial* laceration which was sutured at the San Joaquin Hospital (CT p. 28). This laceration was well in the process of healing when appellant left the San Joaquin Hospital (CT p. 36). No complaint was ever made about the knee by appellant until some unidentified time upon her return to Chicago when she was kneeling in church (CT p. 50). She kneels on the knee, but makes the subjective complaint of pain (CT p. 50).

E. Concussion: There is no evidence of any period of unconsciousness in the hospital records of the San Joaquin Hospital. On August 28, 1953 at 9:00 a.m. appellant was conscious, at which time a neurological examination was performed without difficulty (CT p. 39 and 40). This neurological examination in the San Joaquin Hospital was negative (CT p. 32). Appellant was alert and eating well; was entertaining visitors; was cheerful and was reading during her stay in the San Joaquin Hospital for the six days immediately following the accident (P Ex 11). No x-ray pictures were taken of the skull (or any other part of her

natomy) and there were no complaints or symptoms o indicate the necessity of x-rays (CT p. 34 and 36). There were no complaints to indicate any particular rain damage, and the hospital records denote the *bsence* of headaches at any time, including the initial eriod after the accident (CT p. 37 and 40). A concussion is diagnosed from a history of unconsciousess, and headaches are a mere subjective complaint CT p. 183). An extensive neurological examination n March 31, 1955 (five days before trial began) by highly qualified neurologist was entirely negative except as to the injury to the nerve on the left side f the face) (CT p. 178, 179 and 180).

STATEMENT OF POINTS TO BE URGED.

In opposition to points urged by the appellant, appellee contends that the damages awarded to the ppellant by the jury *were not* grossly and patently nadequate, and certainly do not indicate passion, rejudice or corruption on the part of the jury; and ppellee further contends that the trial court's order enying appellant's motion for a new trial was an buse of discretion, and did not constitute error of aw.

ARGUMENT.

I. THE DAMAGES AWARDED APPELLANT WERE NOT GROSSLY AND PATENTLY INADEQUATE, AND CERTAINLY DO NOT INDICATE PASSION, PREJUDICE OR CORRUPTION ON THE PART OF THE JURY.

Appellant argues that the $6000 awarded to appellant is made to appear grossly inadequate by the fact that the same jury awarded to appellant's parents $4000 for past and prospective hospitalization, medical and dental care. It is difficult to follow such a line of reasoning. The jury in awarding $4000 as special damages apparently gave full credence to every claim of past and estimated future expense even though some of these items were, in appellee's opinion, either exorbitant or highly conjectural. The total amount of medical special damages that had been incurred by appellant's parents at the time of the trial was $2619.21. The bill of the plastic surgeon was extremely high, but was not challenged by appellee since his work was so phenomenal.

The jury apparently added to this figure $1000 for an additional fee of $500 by the plastic surgeon and an additional $500 hospital bill *even though* this additional work was of a comparatively minor nature and the *actual* hospital bill for the *original* plastic surgery was only $167.55. The jury also must have taken into consideration the evidence that *if* the permanent dentures would require replacement several years in the future, the cost would be around $350.

Does such consideration by the jury of the claimed expenses by the appellant's parents permit an argu-

ent that because they were liberal in this instance ey must have been swayed by prejudice or passion *ainst* the appellant in making its award to appel- nt?

Rather than this, does not such behavior by the y support a conclusion that they were in no way ayed by passion or prejudice, but rendered to ap- llant a verdict that they felt was entirely fair and asonable for her general damages?

The award of $6000 was, of course, entirely for *neral* damages which cannot be measured by any rdstick.

Appellant's brief and the nature of the conduction the trial on behalf of appellant clearly indicates at in appellant's mind the greatest portion of her mage, by far results from her facial scars. The ly thing in the record that portrays the nature and tent of these facial scars are the photographs taken the appellant very shortly after the accident when idence for the law suit was apparently the foremost ncern in appellant's mind. However, the important ng is this: The appellant made no such appearance the courtroom as portrayed by the photographs troduced into evidence. She had undergone plastic rgery at the hands of one of the nation's leaders that field who had accomplished at least a 75 per- nt improvement up to the time of trial, with addi- onal surgical corrections contemplated for the fu- re. At the time of trial only five months had elapsed nce the first stage of the plastic surgery, and even me itself was to act as a further improving factor.

The jury and the court reviewed the photographs which had been taken shortly after the accident; but more important, the court and the jury were able to see through a period of four days the appellant herself and were able to see and fully realize the miraculous improvement in appellant's appearance, and the tremendous contrast between the photographs and the appellant's appearance at the time of trial. The observations of the court and the jury as to the near obliteration of the scars as they appeared in the photographs is something that the record cannot disclose.

Appellee does not believe that this court of appeal could conscientiously supplant any mental picture that *it* might possibly create from the black and white transcript and the pre-surgery photographs, in the place and stead of the actual observations of the appellant's true appearance as it was seen by the twelve jurors and the trial judge.

The alleged chip fracture of the styloid process of appellant's left ulnar bone and the superficial laceration of the right knee are insignificant injuries. The *subjective* complaints of the appellant and her mother concerning these injuries only tend to accentuate the appellant's tendencies to exaggerate, and her mother's tendencies to exhibit unwarranted and exaggerated concern over her daughter's injuries.

The missing teeth have been permanently and satisfactorily replaced without disturbing the appellant's facial contour or her bite.

The laceration on appellant's knee was described by Dr. Evans as superficial and was sutured and

ealed and certainly was insignificant and created no ıbjective complaint until apparently several months ıter when, according to appellant's mother, the appel-ınt complained of it while kneeling in church.

The injuries above outlined, namely, the facial ears, the lost teeth, the alleged chip fracture, and ıe laceration of the knee were the only *objective* in-uries. The complaints of alleged brain damage and sychotic reaction were all purely *subjective* com-laints; therefore fall into a different category and ill be discussed later.

It is well to repeat that the $6000 awarded to the ppellant was entirely an award of general damages; nd, as stated above, there is no yardstick by which measure general damages.

As stated in the case of *Crowe v. Sacks,* 44 C. (2d) 90, 597, "The issues as to loss of earnings or earning ower and as to pain and suffering were disputed, nd the amount to be awarded as compensation there-or was within the province of the jury to determine. *hese amounts are unliquidated.* It cannot be pre-umed on appeal that any element of damage is gnored by the jury merely because the verdict is not or a large sum of money." (Emphasis added.)

In reference to the statement of facts as to appel-ınt's injuries and damage as related above, appellee efers to the case of *Signorelli v. Miller,* 55 C.A. (2d) 38 in which the following language will be found t page 542:

> "In scrutinizing and construing the evidence, we are bound to view its aspects most favorably to sustaining a verdict."

The appeal in the *Signorelli* case resulted from a verdict of $275 in favor of the plaintiff, which plaintiff contended was inadequate, but which judgment was affirmed.

Appellant contends that the damages awarded her by the jury was grossly and patently inadequate. Appellee believes that the only possible basis for an appeal from the jury's award would be on the ground that the award is such as to suggest passion, prejudice or corruption on the part of the jury. (*Sassano v. Roullard,* 27 C.A. (2d) 372; *Morris v. Standard Oil Company,* 188 C. 468; *Bisinger v. Sacramento Lodge No. 6,* 187 C. 578, and many others.)

The case of *Sassano v. Roullard,* (supra) was a case in which a seven year old plaintiff received a wound on the forehead and nose which left a scar that would remain with plaintiff throughout life. Plaintiff appealed from a judgment based upon a jury's verdict in the amount of $250, and the judgment was affirmed. In part, the opinion of the court stated:

> "The principal question for our consideration is that of the adequacy of the damages to compensate for the injuries suffered. In considering this question we must bear in mind the firmly established rules that the jury is the judge of the weight and sufficiency of the evidence and the credibility of the witnesses; that the question of the award of damages and their amount is primarily one for the jury; that on a motion for new trial the trial judge sits as a thirteenth juror; that it becomes his duty to again weigh the evidence and its sufficiency and measure the credibility of

the witnesses; that in so doing it is also his duty to consider the adequacy or inadequacy of the amount of damages awarded; that if he finds the damages either excessive or inadeqate it is his duty to grant a new trial either generally or upon the special issue of the amount of damages or himself reduce excessive damages.

Doing justice between litigants is the prime object of the law. It is in the trial court that this object should be sought and can be obtained by a trial judge who will fearlessly perform the duties of his office and who will exercise a reasonable and lawful control over verdicts. This is a responsibility that cannot be shifted to an appellate court. It rests on the shoulders of the trial judge and no other for the power of appellate courts to control the amount of damages awarded comes into play only when the facts before it are such as to suggest passion, prejudice or corruption on the part of the jury."

In another part in the opinion in the *Sassano* case, e court stated:

"There is no fixed standard by which we may determine the exact amount of money that will compensate one for an injury. (Clare v. Sacramento etc. Co., 122 Cal. 504 (55 Pac. 326).) In the absence of such a standard or precise rule the assessment of the amount of general damages of necessity and to a large extent must be left to the good sense and sound discretion of the jury. (Grant v. Los Angeles Traction Co., 45 Cal. App. 731 (188 Pac. 294).) As we have already seen, it is only when the amount of the award indicates passion, prejudice or corruption on the part of a

jury that an appellate court can interfere with the amount of an award."

The case of *Johnson v. McRee,* 66 C.A. 2d 524, involves a seven year old minor plaintiff who was struck by an automobile, was semi-conscious and in shock following the accident, was bleeding from lacerations of the right temple and right eyebrow, had her legs badly skinned, and many abrasions of her shoulder, knee, cheek and other parts of her body. She remained in the Glendale Sanitarium for one week, having a special nurse during the first night. After returning home she did not move her arms or legs for a week or two, suffered from loss of sleep and pain, occasionally awakening in the night screaming. She remained in her bed at home for a period of three weeks, had bandages on her wounds for more than one month, suffered a concussion of the brain, developed a skin infection, impetigo, which lasted the better part of a month. The accident occurred in November and she returned to school in January. The wound on the right temple left a permanent scar, and the laceration of the right eyebrow also left a scar with a black mark in it, the removal of which would require plastic surgery, and which was also true of black marks on the right cheek. She had occasional headaches for some six or seven months after the accident. The nature and extent of her injuries were proved by physicians who treated her and by members of her family. The defendants offered no evidence.

The jury in this case awarded plaintiff a judgment of $600 from which the plaintiff appealed on the

round of inadequacy of damages, and the judgment as affirmed.

In the *Johnson* case, the court in its opinion stated:

> "Plaintiff's injuries are such as would have justified a verdict materially larger than the one rendered, but this fact would not constitute a sufficient ground for reversal. The appraisal of injuries for the purpose of fixing compensatory general damages is necessarily left to the discretion of the jury. It is a matter of common knowledge that individual opinions as to the amount which will compensate for injuries in a given case may rest at any point in a broad scale and that the consensus of opinion that will be reflected in a verdict is highly unpredictable. But the fact that the amount may be too high or too low, as verdicts go, does not indicate that the result has been reached through passion, prejudice or corruption. It would not be reasonable to suppose that the jury would have been prejudiced against this unfortunate little girl who had been injured without fault upon her part. Nor can it be argued that the amount was reached by compromise upon the issue of liability, since that was admitted. The trial judge exercises a broad discretion upon motion for new trial to set aside a verdict which he believes to be against the weight of the evidence. A reviewing court has no such discretion."

The very recent case of *Sills v. Soto,* 124 C.A. (2d) 39, at page 545, states:

> "The gravity of alleged injuries presents a question of fact which is within the province of the jury to determine. In evaluating the nature and

effect of appellant's injuries, the jury could consider that they had not necessitated hospitalization nor the keeping of appellant under opiates. In fact, he was never bedridden. The appellant was able to attend the trial and the jury could from his physical appearance, facial expressions, and general demeanor draw its own conclusions as to how much pain he was then experiencing. Another factor which the jury could take into account was that only three doctors testified, although appellant was examined or treated by four or five others after the accident. The jury could also consider that the medical opinions expressed were based largely on complaints made by appellant and not on objective symptoms. The jury may have concluded that appellant exaggerated his ailments. (Harris v. Los Angeles Transit Lines, 111 Cal. App. 2d 593, 599 (245 P. 2d 35).) Since it cannot be said that from all the facts and the inferences which could be drawn therefrom there could not be a reasonable difference of opinion as to whether or not appellant's general damages exceeded $1,841.80, it cannot be held as a matter of law that the $2,500 awarded him by the jury was inadequate. For the same reason, it cannot be said that the trial judge abused his discretion in refusing to grant a new trial on the ground that the damages were inadequate."

Now we will consider the other allegations of injuries by appellant in addition to those *objective* injuries discussed above. These other alleged injuries are the concussion and the emotional or psychiatric reactions which were diagnosed from various *subjective* symptoms.

The only bases for a finding that these additional *bjective* injuries occurred or exist are the com-aints of the appellant which came into evidence rough history that she gave to doctors, and the testi-ony of appellant's mother.

As a matter of fact, as far as the symptoms of a ncussion are concerned, the only unbiased and edically-founded evidence in this regard is contained the records of the San Joaquin Hospital which re introduced into evidence by appellant herself. As rtions of these hospital records were above related, ey form the basis for a finding that any concussion, ner than a very mild one, actually *did not* occur. to a jury's right to discount or refuse to accept stimony as to subjective complaints, and as to the ty of an appellate court to sustain a jury's refusal accept purely subjective complaints, the very recent se of *Nelson v. Black,* 43 C. (2d) 612, is quite perti-nt.

In that case the defendants admitted liability for e accident and contested only the issue of damage. he jury, however, returned a verdict in favor of e defendants and the judgment based on this verdict as affirmed on appeal. The opinion of the California preme Court stated:

> "He (plaintiff) claims that as a result of the impact he was partially or totally disabled for some time and incurred medical and hospital expenses amounting to more than $600. But there was no objective manifestation of injury, and the testimony of the medical experts presented by him was based entirely upon his statements to

> them in regard to headache and other pain which he assertedly suffered. . . . From the conflicts in his own testimony and with other evidence in regard to the nature of the medical treatment he received, the extent and duration of his asserted disability, and his physical condition prior to the accident, the jury reasonably could have concluded that he testified falsely concerning those matters. Having so determined, it could have disregarded his entire testimony (Code Civ. Proc., 2061, subd. 3), concluded that he suffered no injury, and found all of his subjective complaints to be false."

As above stated, all of the evidence of these subjective complaints came either from the appellant's history to physicians, or from appellant's mother's testimony.

We have discussed above the appellant's tendencies in her history to exaggerate, for example, the symptoms resulting from the rather trivial injury to the left arm and the superficial laceration of the knee. Also appellant's testimony as to three days of unconsciousness immediately following the accident (CT p. 200) is a gross exaggeration, if not an intentional falsehood, when such testimony is compared to the hospital records of the San Joaquin Hospital (P Ex 11).

As to the appellant's mother's testimony, it is quite apparent that the mother was prone to greatly exaggerate, or falsify in several instances. On one of these instances the mother testified that appellant saw Dr. Smalley on an average of twice a week for the

st six months and on an average of once a week ereafter (CT p. 48 and 49), which would make a tal of 78 times during the first 12 months of treatent by Dr. Smalley; whereas Dr. Smalley testified at from October 9, 1953 to October 14, 1954, he saw pellant a total of 18 times (CT p. 167 and 168). On other occasion appellant's mother testified that apllant's memory had been affected by the accident d that she was very forgetful (CT p. 59 and 60); ereas, the appellant herself during cross-examinan (CT p. 203 to 205) displayed a rather remarkable mory for dates and small details of incidents in e past. As another example, appellant's mother tified as to an impairment in appellant's gait (CT 62); whereas, an examination of her gait by a urologist, five days before the trial, disclosed a pertly normal gait (CT p. 180).

It was within the power of the jury after hearing ese exaggerations or falsehoods to disregard the tire testimony of the appellant and her mother in cordance with the rule laid down in the case of *Nelon v. Black* (supra). It cannot be stated definitely at the jury actually did disregard all of the appelnt's complaints of a subjective nature because the ward of $6000 for general damages was a substantial ward, but if, in fact, the size of the jury's verdict as altered because of the jury's refusal to believe all the subjective complaints, the jury was justified making such alterations.

In her argument on this point, the appellant cites ly one "authority". This is the case of *Macias et*

al. v. Western Union Telegraph Company, et al., 83 Federal Supplement 492. It will be noted first of all that this opinion was the opinion of a District Court Judge in support of the trial court's granting of a new trial to the minor plaintiff. As stated in *Johnson v. McRee* (supra):

> "The trial judge exercises a broad discretion upon motion for new trial to set aside a verdict which he believes to be against the weight of the evidence. A reviewing court has no such discretion."

Further language from the case of *Johnson v. McRee* is as follows:

> "The decision upon motion for a new trial that the verdict as to the amount was not against the weight of evidence must necessarily have great weight upon appeal, where the contention is, in effect that the evidence was disregarded by the jury. The limitations upon the power of a reviewing court to vacate a judgment for inadequacy of damages are too well understood to require elaboration. They are fully stated in Sassano v. Roullard (supra) and cases therein cited."

Appellee certainly does not dispute the power and duty of a district court judge to grant a new trial on the ground that the damages awarded were inadequate if such a district court judge believes that the ends of justice demand such a new trial. The opinion in the case of *Macias v. Western Union* simply states the trial court's reason for granting a new trial.

THE TRIAL COURT'S ORDER DENYING APPELLANT'S MOTION FOR A NEW TRIAL DID NOT AMOUNT TO SUCH AN ABUSE OF DISCRETION AS TO CONSTITUTE ERROR OF LAW.

California law does not permit an appeal from an der denying a new trial (*Signorelli v. Miller,* upra]). However, whether or not this appeals court ould follow the California rule in this regard or ether it is a matter of procedure will not be argued. this point, however, appellee wishes to initiate his gument by quoting from the opinion of Justice andeis in the case of *Fairmont Glass Works v. Cub rt Coal Company,* 287 U.S. 474, 53 S.Ct. 252, 77 Ed. 439:

> "The rule that this court will not review the action of a Federal trial court in granting or denying a motion for a new trial for error of fact has been settled by a long and unbroken line of decisions and has been frequently applied where the ground of the motion was that the damages awarded by the jury were excessive or were inadequate. The rule precludes likewise a review of such action *by a Circuit Court of Appeals.* Its early formulation by this court was influenced by the mandate of the judiciary act of 1789 which provides . . ." (Emphasis added.)

Appellee submits that the language above quoted n be construed in only one way and as applied to s case, where the trial court has denied a motion new trial made on the ground that the damages arded by the jury were inadequate, is a clearly ted directive to this appeals court *not* to review the ion of the trial court in this regard.

Appellant does not escape the effect of the decision in the *Fairmont Glass Works* case simply by dividing her argument into two sections. If this appeals court were to declare the damages awarded to the appellant to be inadequate as a matter of law *on any ground* this appeals court would, in effect be reviewing the action of the trial judge in denying plaintiff's motion for a new trial.

If any other argument can be considered in any way necessary in this case, appellee again briefly refers to the fact that the trial judge, as well as the 12 jurors, had an opportunity to see the plaintiff at close range and often during the four day trial and had a true picture of appellant's appearance and the effect, if any, that her injuries had upon her, and even with his broad powers of discretion on appellant's motion for a new trial, the trial court saw fit to deny said motion. Again we repeat that certainly this appeals court is in no position, from a mere review of the record, to go so far as to say that the trial judge abused his discretion. This is especially so when we consider that not only has this appeals court been deprived of an opportunity to actually observe the appellant at this time, but more so when we consider the limitations on the powers of an appeals court to set aside a verdict for inadequacy of damages.

Appellant does not believe that any of the cases cited by appellant in any way bolster her position. The first case cited *Berry v. Lake Erie and W. R. Co.,* 72 Fed. 488, is simply an opinion of a trial judge in support of the trial judge's *denial* of a new trial be-

ıse of alleged inadequacy of the jury's award. In s case the trial judge stated that the verdict of 100.00 for the loss of the right leg of the 7 year old ıor plaintiff below the knee was certainly consider- y less than he would have awarded in the case, but ll the trial judge did not feel that he could, even his discretion on this matter, grant a new trial.

The case of *Virginia Ry. Co. v. Armentrout,* 116 d. (2d) 400, is simply another example of the re- sal by a court of appeals to set aside a verdict of jury. In this case the court simply decided that ey could not, as a matter of law, state that 50,000.00 was excessive for the loss by plaintiff of h of his hands and arms.

The case of *Aetna Casualty and Surety Company Yeatts,* 4 Cir., 122 F. (2d) 350. The appeal in this e was not based upon inadequacy or excessiveness the jury's award. The court stated, however:

> "Verdict may be set aside and a new trial granted when the verdict is contrary to the clear weight of evidence or whenever, in exercise of a sound discretion, the trial judge thinks this action necessary to prevent a miscarriage of justice.
>
> It is equally well settled, however, that the granting or refusing of a new trial is a matter resting in the sound discretion of the trial judge and that his action is not reviewable upon appeal save in the most exceptional circumstances."

At the end of this statement the court cited a long of authorities and then quoted the same portion the opinion of Justice Brandeis in the case of *Fair-*

mont Glass Works v. Cub Fort Coal Co., that appellee has quoted above. This case, therefore, supports the position of the appellee in this appeal and we cannot see that it does in any way aid the appellant.

The case of *Southern Pacific Co. v. Guthrie,* 186 Fed. 2d 926, is simply a case wherein the appeals court again refused to reverse a District Court which had denied a motion for a new trial based on excessive damages.

The case of *Cunningham v. State,* 34 N.Y.S. 2d, 309, apparently involves proceedure not in accord with procedure in the state of California. Appellee is not familiar with the system of courts in the state of New York and is not sure that the "appeal" in this case was not simply a review by the trial court. Otherwise appellee cannot account for an increase in an award by an appeals court.

It is most interesting to note that appellant offers no case wherein any court of appeal has reversed a trial court for refusing to grant a new trial based upon inadequacy of damages.

CONCLUSION.

Examination of the evidence in the light most favorable to sustain the verdict indicates that the damages awarded appellant were adequate; but if the evidence is susceptible to the interpretation that appellant was entitled to a more substantial award, there is no indi-

ion that the jury made its award under the influ-
e of passion, prejudice or corruption.

Examination of the authorities indicates that since
trial court denied appellant's motion for a new
l based upon error of fact, this appeals court has
power to review such action by the trial court.
wever, if the appeals court does review such action
the trial court, its limitations in that regard are
h as to preclude any reversal of the trial court's
ions because of the state of the record.

Dated, Sacramento, California,
April 2, 1956.

Respectfully submitted,
FITZWILLIAM & MEMERING,
Attorneys for Appellee.

No. 14912

United States
Court of Appeals
for the Ninth Circuit

NNE G. MOHOLY, as Administratrix of the Estate of PHILIP F. MOHOLY, Deceased, and ANNE MOHOLY,

Appellant,

vs.

NITED STATES OF AMERICA,

Appellee.

Transcript of Record

Appeal from the United States District Court for the Northern District of California, Southern Division.

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.—12-30-55

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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On appeal from the United States District Court for the Northern District of California, Southern Division.

Decision of the Honorable Edward P. Murphy, District Judge.

In the Southern Division of the United States District Court for the Northern District of California

No. 33489

PHILIP F. MOHOLY and ANNE MOHOLY,

Plaintiffs,

vs.

UNITED STATES OF AMERICA,

Defendant.

COMPLAINT FOR REFUND OF INCOME TAXES ILLEGALLY COLLECTED

Now Come the above-named plaintiffs and complain of the above-named defendant, and for cause of action allege:

I.

That the defendant United States of America is a corporation sovereign and body politic; that plaintiffs are now and at all times herein mentioned have been citizens of the United States and residents of the City and County of San Francisco, State of California, and within the said Northern District of California; that the Court has jurisdiction over this matter under the provisions of Title 28, Sections 1340 and 1346, United States Code.

II.

That at all times during the year 1949 plaintiffs Philip F. Moholy and Anne Moholy were husband

and wife; that within the time allowed by law therefor, plaintiffs caused to be prepared, executed and filed their joint income tax return for the year 1949; that said income tax return was filed with the Collector of Internal Revenue at San Francisco, California, and said return showed that plaintiffs had a gross income during the year 1949 of $4,872.00 and that there had been withheld from the wages of plaintiff Philip S. Moholy and paid by the City and County of San Francisco to the Collector of Internal Revenue at San Francisco the sum of $535.20; that the total tax shown by said return to be due from plaintiffs to defendant was $529.00, and the sum of $6.20 representing the difference between the sum withheld and the tax shown on the return was credited or refunded to plaintiffs.

III.

That during the year 1949, plaintiff Philip F. Moholy was employed as a Fireman of the City and County of San Francisco and sustained personal injuries during the performance of his duties as a Fireman, resulting in his disability for 68 days; that said Philip F. Moholy was also ill and unable to work for 35 days during the year 1949, and for the total of 103 days of such disability and sickness he received the sum of $13.33 per day from the City and County of San Francisco, or a total of $1,373.00; that said sum was paid to the plaintiffs pursuant to the provisions of the Workmen's Compensation Insurance and Safety Act of the State of California implementing the provisions of the

Charter and Ordinances of the City and County of San Francisco or in the alternative as accident or health insurance; that the said sum of $1,373.00 received by said Philip S. Moholy during the calendar year 1949, as aforesaid, should be excluded from the gross income of the plaintiffs under the provisions of IRC Sec. 22B(5) as "amounts received through accidents or health insurance or under workmens' compensation acts as compensation for personal injuries or sickness."

IV.

That at all times herein mentioned plaintiffs kept their books of account and filed their income tax returns on the calendar-year basis and on the cash basis of accounting; that by reason of the inclusion of said sum of $1,373.00 in the income of these plaintiffs for the year 1949, said plaintiffs overpaid their income tax to the defendant for the year 1949 in the sum of $209.00.

V.

That on or about the 14th day of March, 1953, and within the time allowed by law therefor, plaintiffs caused to be prepared, executed and filed with the Director of Internal Revenue at San Francisco, California, a Claim for the refund of said sum of $209.00 collected and retained by the said defendant; that a copy of said refund Claim is marked Exhibit A and annexed hereto and is incorporated herein with the same force and effect as if herein set forth

in haec verba; that more than six months has elapsed from the date of filing said refund Claim; that the Commissioner of Internal Revenue has never granted said refund Claim, and that plaintiffs hereby elect to consider said Claim rejected.

VI.

That no part of said sum of $209.00 ever was or is legally owing or payable to the said defendants as and for an income tax of plaintiffs for the calendar year 1949 or for any period or otherwise or at all; that said amount and the whole thereof was erroneously collected by defendant from plaintiffs; that no part of said sum has been repaid or scheduled for refund to plaintiffs and the whole thereof, together with interest thereon from March 15, 1950, is now due, owing and unpaid from defendant unto plaintiffs.

Wherefore, plaintiffs pray for judgment against defendant in the sum of $209.00, together with interest thereon from March 15, 1950, and for such other or further relief as may be meet and just in the premises.

/s/ CLYDE C. SHERWOOD,

/s/ JOHN V. LEWIS,

Attorneys for Plaintiffs.

EXHIBIT A

Form 843,
U.S. Treasury Department.

Claim

To Be Filed With the Collector Where Assessment Was Made or Tax Paid

The Collector will indicate in the block below the kind of claim filed, and fill in, where required, the certificate on the back of this form

- ☐ Refund of Taxes Illegally, Erroneously, or Excessively Collected.
- ☐ Refund of Amount Paid for Stamps Unused, or Used in Error or Excess.
- ☐ Abatement of Tax Assessed (not applicable to estate, gift, or income taxes).

[Collector's Stamp]: Received March 14, 1953, Director Int. Rev., San Francisco, 83.

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Name of taxpayer or purchaser of stamps: Philip F. and Anne Moholy.

Address: c/o Sherwood and Lewis, 703 Market Street, San Francisco, California.

1. District in which return (if any) was filed: First California.

2. Period (if for tax reported on annual basis, prepare separate form for each taxable year): From Jan. 1, 1949, to Dec. 31, 1949.

3. Kind of tax: Income.

4. Amount of assessment, $529.00; dates of payment on or Before March 15, 1950.

* * *

6. Amount to be refunded: $209.00 or Such Greater Amount as is Legally Refundable.

* * *

Adjusted gross income and taxable net income for the above specified taxable year have been overstated by the sum of $1,373.00.

Taxpayer husband during the taxable year was employed as a fireman by the City and County of San Francisco and sustained personal injury or sickness during the term of this employment. The above-mentioned sum represents amounts received, through health or accident insurance or under Workmen's Compensation Acts, as compensation for personal injuries or sickness and/or as damages on account of such injuries or sickness. Said amounts were paid to taxpayer husband as sickness benefits under a health insurance plan maintained by his employer, the City and County of San Francisco, for the protection of its employees and/or as Workmen's Compensation benefits or disability payments for personal injuries or illness arising in the course of employment, pursuant to the provisions of the Workmen's Compensation Insurance and Safety Act of the State of California and implementing provisions of the charter and ordinances of the City and County of San Francisco.

Taxpayer's income tax return for the above-specified taxable year is incorporated by reference herein.

I declare under the penalties of perjury that this claim (including any accompanying schedules and statements) has been examined by me and to the best of my knowledge and belief is true and correct.

/s/ PHILIP F. MOHOLY,

/s/ ANNE MOHOLY.

Dated March 14, 1953.

Duly verified.

[Endorsed]: Filed April 13, 1954.

[Title of District Court and Cause.]

ANSWER

The United States of America, by its attorney, Lloyd H. Burke, United States Attorney for the Northern District of California, answers as follows:

1.

Admits the allegations of Paragraph I of the Complaint.

2.

Denies the allegations of Paragraph II of the Complaint, except it is admitted that at all times during the year 1949, plaintiffs, Philip F. Moholy

and Anne Moholy, were husband and wife; that within the time allowed by law plaintiffs caused to be prepared, executed and filed their joint income tax return for the year 1949; that said income tax return was filed with the Collector of Internal Revenue at San Francisco, California; and said return showed that plaintiffs had a gross income during the year 1949 of $4,972.00 and that there had been withheld from the wages of plaintiff, Philip F. Moholy, and paid by the City and County of San Francisco to the Collector of Internal Revenue at San Francisco, the sum of $535.20; and that the total tax shown by said return to be due from plaintiffs to defendant was $544.00, and the sum of $8.80 representing the difference between the sum withheld and the tax shown on the return was remitted to the defendant.

3.

Defendant is without information and knowledge sufficient to form a belief as to the truth of the allegations of Paragraph III, and they are accordingly denied.

4.

Denies the allegations of Paragraph IV, except it is admitted that during the calendar year 1949, plaintiffs kept their books of account and filed their income tax returns on the calendar year basis and on the cash basis of accounting.

5.

Denies the allegations of Paragraph V, except it is admitted that on March 14, 1953, plaintiffs timely

filed with the Director of Internal Revenue at San Francisco, California, a claim for refund of said sum of $209.00 collected and retained by this defendant; that a copy of said claim is attached and marked Exhibit A; and that more than six months has elapsed from the date of filing thereof without formal disallowance by the Commissioner of Internal Revenue.

6.

Denies the allegations of Paragraph VI, except it is admitted that no part of said $209.00 collected by defendant from plaintiffs has ever been repaid or scheduled for refund to the plaintiffs.

Wherefore, defendant prays that the plaintiffs' Complaint be dismissed and that the defendant be awarded its costs in this behalf expended.

/s/ LLOYD H. BURKE,
United States Attorney.

Affidavit of mail attached.

[Endorsed]: Filed August 11, 1954.

[Title of District Court and Cause.]

STIPULATION FOR THE SUBSTITUTION OF ANNE G. MOHOLY AS ADMINISTRATRIX FOR PHILIP F. MOHOLY, DECEASED.

It Is Hereby Stipulated by the above-named parties, acting by and through their respective at-

torneys, that the Court may make an order without notice substituting Anne G. Moholy as Administratrix of the estate of Philip F. Moholy, deceased, in the place and stead of Philip F. Moholy as one of the plaintiffs in the above-entitled action.

Dated: November 11, 1954.

SHERWOOD AND LEWIS,

By /s/ JOHN V. LEWIS,
Attorneys for Plaintiffs.

/s/ LLOYD H. BURKE,
United States Attorney,
Attorney for Defendant.

[Endorsed]: Filed November 17, 1954.

[Title of District Court and Cause.]

ORDER SUBSTITUTING ANNE G. MOHOLY AS ADMINISTRATRIX OF THE ESTATE OF PHILIP F. MOHOLY, DECEASED, FOR PHILIP F. MOHOLY AS ONE OF THE PLAINTIFFS IN THE ABOVE-ENTITLED ACTION

Pursuant to the Stipulation of the Parties, acting by and through their respective counsel, and the Court being fully advised in the premises,

It Is Hereby Ordered, Adjudged and Decreed that Anne G. Moholy, the Administratrix of the estate of Philip F. Moholy, deceased, is hereby sub-

stituted as a party plaintiff in the place and stead of Philip F. Moholy, who is named as one of the plaintiffs in the above-entitled action.

Dated: November 17, 1954.

/s/ OLIVER J. CARTER,
District Judge.

[Endorsed]: Filed November 17, 1954.

[Title of District Court and Cause.]

ORDER

Judgment will be entered for the plaintiffs for that portion of the tax attributable to disability payments only. That portion of the tax attributable to sick leave payments was properly assessed and will not be included in the judgment for the plaintiffs.

I will file at a later date a memorandum opinion which, together with the stipulated facts, will constitute findings of fact and conclusions of law.

Dated: March 31, 1955.

/s/ EDWARD P. MURPHY,
United States District Judge.

[Endorsed]: Filed March 31, 1955.

[Title of District Court and Cause.]

MEMORANDUM OPINION

Murphy, District Judge.

This is a tax refund suit. In a joint return for the taxable year 1949, plaintiffs included as income:

(a) Nine Hundred ($900.00) Dollars received by Philip Moholy as disability pay from the City and County of San Francisco. Moholy, a Captain in the City Fire Department, was thrown from a fire truck while answering an alarm. He was incapacitated for 68 days.

(b) Four Hundred Eighty-nine and 17/100 ($489.17) Dollars received as sick pay. Captain Moholy was ill with bronchitis and was unable to work for a period of 35 days. This money was paid to him pursuant to the provisions of the City Charter, Ordinances and Regulations.

Plaintiffs filed a claim for refund with the Commissioner for the tax attributable to these two amounts. The Commissioner did not act upon the claim during the statutory six months.

Plaintiff contends that these amounts are excludable from gross income under Section 22(b)(5) of the Internal Revenue Code as it existed in 1949. That section provided as follows:

"I.R.C. Sec. 22 * * *

"(b) Exclusions from Gross Income—The following items shall not be included in gross

income and shall be exempt from taxation under this chapter: * * *

"(5) Compensation for injuries or sickness. —Except in the case of amounts attributable to (and not in excess of) deductions allowed under section 23(x) in any prior taxable year, amounts received, through accident or health insurance or under workmen's compensation acts, as compensation for personal injuries or sickness, plus the amount of any damages received whether by suit or agreement on account of such injuries or sickness, and amounts received as a pension, annuity, or similiar allowance for personal injuries or sickness resulting from active service in the armed forces of any country; * * * (emphasis added).

The plaintiff contends and the government has conceded that the Nine Hundred ($900.00) Dollars received as a result of Captain Moholy's injury constitutes "amounts received under Workmen's Compensation Act for personal injuries."

The only question remaining is whether the Four Hundred Eighty-nine and 17/100 ($489.17) Dollars received as such leave pay is excludable from gross income as "amounts received through accident or health insurance" as those words are used in the statute.

Those amounts were paid pursuant to Section 153 of the Charter of the City and County of San

Francisco and Rule 32, section 11, adopted by the Civil Service Commission.

Section 153 provides as follows:

> "The Civil Service Commission by rule and subject to the approval of the board of supervisors by ordinance, shall provide for leaves of absence, due to illness or disability, which leave or leaves may be cumulative, if not used as authorized, provided that the accumulated unused period of sick leave shall not exceed six (6) months, regardless of length of service, and provided further that violation or abuse of the provisions of said rule and ordinance by any officer or employee shall be deemed an act of insubordination and inattention to duties."

Rule 32 provides as follows:

> "Police and Fire Departments: Sick leaves and disability leaves granted to members of the uniformed forces of the Police Department and Fire Department shall be regulated by rules adopted respectively by the Police Commission and Fire Commission which rules, and amendments thereto, shall be subject to the approval of the Civil Service Commission, and when so approved by the Civil Service Commission shall be deemed as included in this rule. (Sick leave rules of the Fire Department approved Minutes of April 18, 1945. Sick leave rules of the Police Department approved as amended Minutes of February 15, 1950)."

The Sick Rule generally provides that members

of the Fire Department who have regularly occupied their positions continuously for at least one year are entitled to two weeks' "sick leave with full pay." When not used the sick leave is cumulative for a period not to exceed six months.

The argument was principally directed to the question of whether the various provisions of the sick rule coincided with provisions found in normal commercial health insurance and whether these charter provisions are "a contract whereby one undertakes to indemnify another against loss, damage or liability arising from a contingent or unknown event." (California Insurance Code, sec. 22).

The government contends that these sick leave payments are part of an employee's bargained-for compensation for his work; that there is no risk to be insured against since there is no loss of wages and that there is no spreading of the risk.

The plaintiff counters by saying these payments are not wages (citing Adams vs. City and County of San Francisco, 94 C.A. 2d 586 [1949]), that there is a risk of sickness; that the government's reasoning regarding no risk is circular in that the only reason there would be no risk is that the employer has contracted to assume that risk.

All this is interesting. But the problem is not whether the system setting up these payments is like health insurance. The problem is whether the payments are "amounts received through accident or health insurance" as those words are used in the Act. While their meaning in the statute is not free

from doubt, I take it that the words were used in their ordinary service. Cf. Waller vs. U. S., 180 F. 2d 194 (App. D. C. 1950). "Sick leave with full pay" is an ordinary, well-understood phrase. "Health insurance" is likewise an ordinary, well-understood phrase. Taking their ordinary meaning they are not the same. Sick leave pay is just not "amounts received through health insurance."

If Section 105 (d) of the Internal Revenue Code of 1954 has any relation to this problem at all, it shows that Congress can use plain words to exclude these types of payment from gross income.

Two points remain to be made. Adams vs. City and County of San Francisco, 94 Cal. App. 2d 586 (1949), did not hold that payments received under Section 153 were not part of the Wage Contract. The question there decided was that the words "such rate of pay" used in Section 151.3 of the Charter did not include "sick leave and disability leave" within Section 153, but did include the schedules of compensation recommended by the Civil Service Commission after investigation and survey and based upon the prevailing hourly or per diem rate including an allowance for annual vacation under Section 151 of the Charter. This is a problem of construction of a section of the City Charter. It has nothing to do with whether the sick leave payments are wages.

Epmeier vs. U. S., 199 F. 2d 508 (7th Cir. 1952) discusses the problem of whether amounts are re-

ceived "through accident and health insurance" in terms of whether the plan is like commercial insurance. It does not appear whether those payments were full pay for sick leave. It does appear that the employer was an insurance company authorized to, and actively engaged in writing disability insurance as compensation for personal injuries and sickness. The employee's plan was the equivalent of a commercial policy. I do not read Epmeier as holding that all payments by an employer of full pay when the employee is on sick leave are excludable from gross income.

This memorandum together with the stipulated facts will constitute the findings of fact and conclusions of law required by the Rule. The parties have stipulated that they will recompute the tax due. Let a draft of the judgment be prepared and submitted in accordance with the local Rule.

Dated: May 31st, 1955.

/s/ EDWARD P. MURPHY,
United States District Judge.

[Endorsed]: Filed May 31, 1955.

In the United States District Court for the Northern District of California, Southern Division

Civil No. 33489

ANNE G. MOHOLY, as Administratrix of the Estate of PHILIP F. MOHOLY, Deceased, and ANNE MOHOLY,

Plaintiffs,

vs.

UNITED STATES OF AMERICA,

Defendant.

JUDGMENT

This action came on regularly to be heard without a jury before the above-entitled Court, the Honorable Edward P. Murphy presiding, on November 30, 1954. Plaintiffs appeared by Clyde C. Sherwood, Esq., and John V. Lewis, Esq. Defendant appeared by Lloyd H. Burke, Esq., United States Attorney for the Northern District of California, and George A. Blackstone, Esq., Assistant United States Attorney. Evidence having been introduced and the Court having adopted its memorandum opinion filed May 31, 1955, as its findings of fact and conclusions of law, and the parties having agreed upon the amount of judgment,

Now, Therefore, by reason of the law and the evidence and the findings of fact and conclusions of law aforesaid,

It Is Hereby Ordered, Adjudged and Decreed that plaintiffs recover from defendant the principal

sum of $134.00, together with interest thereon in the sum of $42.99, without costs.

Dated: August 3rd, 1955.

/s/ EDWARD P. MURPHY,
United States District Judge.

Affidavit of Mail attached.

Lodged July 21, 1955.

[Endorsed]: Filed August 3, 1955.

Entered August 4, 1955.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Comes now the plaintiffs, appearing by Clyde C. Sherwood and John V. Lewis, their attorneys, and hereby appeal to the United States Court of Appeals for the Ninth Circuit from the judgment entered in the above-entitled case by the United States District Court for the Northern District of California in favor of defendant and against said plaintiffs, on August 3. 1955.

Dated: Sept. 21, 1955.

SHERWOOD & LEWIS,

By /s/ CLYDE C. SHERWOOD,

By /s/ JOHN V. LEWIS,
Attorneys for Plaintiffs.

Affidavit of Service by Mail attached.

[Endorsed]: Filed September 22, 1955.

[Title of District Court and Cause.]

UNDERTAKING FOR COSTS ON APPEAL

Whereas, Anne G. Moholy, Administratrix of the Estate of Philip F. Moholy, Deceased; Anne G. Moholy, Plaintiffs and Appellants in the above-entitled action, have appealed to the United States Court of Appeals for the Ninth Circuit, from a judgment made and entered against them in the District Court of the United States for the Northern District of California, Southern Division, in favor of the Defendant in said action, on the 10th day of October, 1955; and

Whereas, the said appellants are required to give an undertaking for costs on appeal as hereinafter conditioned.

Now, Therefore, Hartford Accident and Indemnity Company of San Francisco, California, in consideration of the premises, hereby undertakes on the part of the said appellants and acknowledges itself bound to the said Defendant in the sum of Two Hundred Fifty and No/100 Dollars ($250.00) that the said appellants will pay all costs which may be adjudged against them on said appeal or on a dismissal thereof, not exceeding, however, the sum of Two Hundred Fifty and No/100 Dollars ($250.00).

It Is Further Stipulated as a part of the foregoing undertaking that in case of the breach of any condition thereof, the above-entitled District Court may, upon notice to the Surety of not less than 10 days, proceed summarily in said proceedings to ascertain the amount which the said surety is bound to pay on account of such breach and render judg-

ment therefor against the said surety and award execution thereof.

Signed, sealed and dated this 10th day of October, 1955.

[Seal] HARTFORD ACCIDENT AND INDEMNITY COMPANY,
By /s/ TREVOR R. LEWIS,
Attorney-in-Fact.

State of California,
City and County of San Francisco—ss.

On this 10th day of October, in the year one thousand nine hundred and fifty-five, before me, Rosaline W. Leong, a Notary Public in and for said City and County, residing therein, duly commissioned and sworn, personally appeared Trevor R. Lewis, known to me to be the Attorney-in-Fact of the Hartford Accident and Indemnity Company, the Corporation described in and that executed the within instrument, and also known to me to be the person who executed it on behalf of the Corporation therein named, and he acknowledged to me that such Corporation executed the same.

In Witness Whereof, I have hereunto set my hand and affixed my Official Seal, at my office, in said City and County of San Francisco, the day and year in this certificate first above written.

/s/ ROSALINE W. LEONG,
Notary Public in and for the City and County of San Francisco, State of California.

My Commission will expire April 30, 1957.

Premium on this Bond is $10.00.

[Endorsed]: Filed October 11, 1955.

The United States District Court, Northern District of California, Southern Division

No. 33489

PHILIP F. MOHOLY and ANNE MOHOLY,

Plaintiffs,

vs.

UNITED STATES OF AMERICA,

Defendant.

Before: Hon. Edward P. Murphy, Judge.

REPORTER'S TRANSCRIPT

November 30, 1954

Appearances:

For the Plaintiffs:
SHERWOOD & LEWIS, By
CLYDE C. SHERWOOD, ESQ., and
JOHN V. LEWIS, ESQ.

For the Government:
LLOYD H. BURKE, ESQ.,
United States Attorney, By
GEORGE A. BLACKSTONE, ESQ.,
Assistant U. S. Attorney.

November 30, 1954, at 10:00 A.M.

The Court: The Court is familiar with the pleadings. You may proceed.

Mr. Sherwood: Does Your Honor wish any opening statement or shall I just call the witness?

The Court: Not necessarily. You can call your witness.

Mr. Sherwood: I would like to call Mr. Shroeder.

WILLIAM J. SHROEDER

called as a witness on behalf of the plaintiffs; sworn.

The Clerk: State your full name.

A. William J. Shroeder.

Q. Where do you reside?

A. San Francisco.

Q. What is your occupation?

A. Supervisor of payrolls, City and County of San Francisco.

Direct Examination

By Mr. Sherwood:

Q. You are here pursuant to a subpoena which was served upon the Controller, Harry D. Ross?

A. Yes.

Q. You were asked to bring with you records pertaining to payments made to the late Captain Philip Francis Moholy? A. Yes.

Q. Do you have those records? [3*]

A. I have transcripts of the records. These are copies signed by the Controller of the time rolls. In fact, the period in which Mr. Moholy was either sick or disabled, and this is the breakdown.

Mr. Sherwood: I will show these to counsel (handing to counsel).

Q. I note, Mr. Shroeder, that on these schedules

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

(Testimony of William J. Shroeder.)

there are certain letters. For instance, there is a letter S. What does that indicate?

A. The symbol SP means sick leave with pay.

Q. There is also the letters DP.

A. Disability leave with pay.

Q. In other words, the days here that are marked SP indicate dates when Mr. Moholy received sick payments? A. That's right.

Q. And DP, that is disability payments?

A. That's right.

Q. Have you made a summary of the information shown on these sheets?

A. Yes, I have. This is the summary that I made, showing the method used in arriving at the amounts paid to Mr. Moholy for sick leave and disability leave.

Mr. Sherwood: I would like to offer, Your Honor, a transcript certified by the Controller of the official records, the Controller of the City and County of San Francisco, [4] showing the payments for disability and for sickness made to the plaintiff for the calendar year 1949.

The Court: Any objections?

Mr. Blackstone: No objection.

The Court: Let them be marked.

(Thereupon transcript of official records, Controller's Office, City and County of San Francisco, disability and sickness payments, 1949, was received in evidence and marked Plaintiff's Exhibit No. 1.)

(Testimony of William J. Shroeder.)

Mr. Sherwood: And also I would like to, if there is no objection, introduce a summary sheet which is merely a summarization for the convenience of the information set forth on those large sheets.

The Court: It may be received.

(Thereupon summarization referred to above was received in evidence and marked Plaintiff's Exhibit No. 2.)

The Court: Is that summary broken down into sick leave and disability?

Mr. Sherwood: Yes, Your Honor. The summary, I might state for the record, shows $489.17 paid as sick leave and $900.00 paid for disability pay.

The Court: How much was the sick leave?

Mr. Sherwood: $489.17. [5]

The Court: All right.

Mr. Sherwood: You may cross-examine.

Mr. Blackstone: No questions, Your Honor.

(Witness excused.)

Mr. Sherwood: I have asked the actuary for the Retirement Board to step over. We phoned him and while he's on his way over I would like to offer some documentary evidence in support of the proceedings.

The Court: All right.

Mr. Sherwood: I have here the Charter of the City and County of San Francisco, as it was in effect during the year 1949. I might say, Your Honor, that the Charter was amended in 1951 and effective in 1952, March 10th. The Government concedes that

monies received for disability payments after that date are excludable, so the Charter provisions as they existed prior to the amendment are the ones that are pertinent to the decision of this case.

I have made copies of two sections which I think the Court will probably want to look at.

I would like to offer the whole charter because it is a published document, it is in the libraries, available to the Court and counsel. And then I would like to withdraw the Charter and I would like leave to place in evidence copies of two sections.

The Court: They are the pertinent sections? [6]

Mr. Sherwood: With the understanding that any of us may refer to any other section that might be necessary, in the briefs, if the Court shall ask for briefs.

The Court: All right. Let the Charter be received and let it be withdrawn.

(Thereupon Charter of City and County of San Francisco was received in evidence and marked Plaintiff's Exhibit No. 3.)

Mr. Sherwood: I would like to leave in evidence as part of this Charter Section 153 of the Charter and Section 172 of the Charter.

I understand that this Court will take judicial notice of the statutory law of the State of California, but, for purposes of convenience, I have copied Sections 3201, 3202, 3300, 3351 and 3700 of the Labor Code of the State of California, which I would like to offer.

The Court: Very well.

Mr. Sherwood: Perhaps it would be better if I offered the Labor Code of the State of California and then——

The Court: Let's follow the same procedure as you did with the Charter.

Mr. Sherwood: Very well, I will offer then the Labor Code of the State of California, as it existed in 1949.

The Court: All right, let it be received.

Mr. Sherwood: I would like to withdraw it and substitute [7] these extracts.

The Court: Let it be received in evidence and withdrawn.

(Thereupon Section 153 of the Charter of the City and County of San Francisco was received in evidence and marked Plaintiff's Exhibit 4; Section 172 was received in evidence and marked Plaintiff's Exhibit No. 5.)

(Labor Code of the State of California was received in evidence and marked Plaintiff's Exhibit No. 6; Sections 3201, 3202, 3300, 3351 and 3700 were received in evidence and marked Plaintiff's Exhibit No. 6A.)

Mr. Sherwood: I would like to offer in evidence the California Insurance Code as it existed in 1949, and withdraw the code and leave in evidence Section 22 and Section 106 of the California Insurance Code.

The Court: So ordered.

(Thereupon California Insurance Code was

received in evidence and marked Plaintiff's Exhibit No. 7; pertinent sections thereof were received in evidence and marked Plaintiff's Exhibit No. 7A.)

Mr. Sherwood: I have furnished counsel with copies of the rules of the Civil Service Commission as they were in effect in 1949, and I would like to offer in evidence the [8] rules of the Civil Service Commission of San Francisco. These are marked effective September 1, 1947, and they were in effect until 1951.

The Court: The rules may be received in evidence. Are there any pertinent sections to which you refer?

Mr. Sherwood: Yes, Your Honor. There may be other things that the Court will want to look at, but in particular the pertinent section here is Rule 32, with particular reference to Section 7 and Section 11 of Rule 32.

I might say, the pertinency of Section 11 is that by that section, Section 11, the Police and Fire Departments are given the right to make their own rules instead of following the rules outlined by the Civil Service Commission, they are given the power to make their own rules, subject to approval by the Civil Service Commission. And I have here, Your Honor, the rules of the Fire Department adopted pursuant to the provisions that I have just referred to, and I ask leave to offer in evidence the official manual of the Fire Department which states it was approved and adopted May 11, 1949.

Inasmuch as the injuries to Captain Moholy occurred in August of 1949, these rules would be applicable to that extent. I have agreed with the Captain of the Fire Department to return this book, if it meets with the Court's approval. I would like to offer the book in evidence, then withdraw it and substitute the rules on sick leave, which I have copied [9] from the book, copies of which I have given to counsel, and counsel has also examined the original. That is the rule adopted by the Fire Department pursuant to that authorization in the Civil Service rule.

The Court: Very well. Let the rule book be received in evidence and it may be withdrawn and the typewritten copy of the so-called sick rule may be received in evidence.

(Thereupon rules of Civil Service Commission, City and County of San Francisco, were received in evidence and marked Plaintiff's Exhibit No. 8.)

(Official manual of Fire Department was received in evidence and marked Plaintiff's Exhibit No. 9; pertinent sections were received in evidence and marked Plaintiff's Exhibit No. 9A.)

The Court: These rules of the Civil Service Commission you are not withdrawing?

Mr. Sherwood: No, Your Honor, I think we should have them all in. Fortunately, they are printed copies and they were available.

I have, Your Honor, copies of documents supplied Mrs. Moholy by the Fire Department, being copies of the records of the Fire Department; I think perhaps I could offer them all as one exhibit because they were all part of the Fire Department's records.

One of them is entitled, "Report of Injury." [10]

The second one is on the form of the Industrial Accident Commission, "Physician's or Surgeon's report of injury to the Department of Industrial Relations of the State of California."

The Court: There isn't any question about the fact that the captain was injured?

Mr. Sherwood: Well, Your Honor, there isn't any question in my mind about the fact that this compensation is exempt. I have never yet found anybody——

The Court: What I am getting at, what is the purpose of introducing those reports?

Mr. Sherwood: I just want to show that he was injured while performing—answering a call to a fire.

Mr. Blackstone: There is no question.

The Court: I would imagine that would be stipulated to by the Government.

Mr. Blackstone: Yes, there is no question about that, Your Honor. We are only arguing questions of law, so far as the Government is concerned. I don't see any useful purpose to be served by the introduction of these records. If you want to put them in, it's perfectly satisfactory with me. I am just wondering whether you are not unduly encumbering the record.

Mr. Sherwood: They do make a complete record.

Suppose I just offer these two, the report of the injury and the Industrial Accident paper. [11]

The Court: All right, let them be received.

(Thereupon report of injury and report of Physician or Surgeon were received in evidence and marked Plaintiff's Exhibit No. 10.)

Mr. Sherwood: If Your Honor please, I am completely in the dark as to the defense in this matter on this particular phase of the case, and so I am just trying to——

The Court: Mr. Blackstone just indicated that he is willing to concede that the captain was injured in the performance of his duty while answering a call to a fire.

Is that correct, Mr. Blackstone?

Mr. Blackstone: Yes, Your Honor.

RALPH R. NELSON

called as a witness on behalf of the plaintiffs; sworn.

The Clerk: State your full name.

A. Ralph R. Nelson.

Q. Where do you reside?

A. 449 Selby Lane, Atherton, California.

Q. What is your occupation?

A. Consulting actuary.

Direct Examination

By Mr. Sherwood:

Q. By whom are you employed?

A. On a part-time basis by the City and County of San Francisco. [12]

(Testimony of Ralph R. Nelson.)

Q. Have you held other positions with the City and County of San Francisco?

A. Yes, prior to the time I entered the status of consulting actuary in 1948, I was secretary-actuary of the Retirement Board.

Q. When did you become secretary-actuary of the Retirement Board?

A. I first became secretary in 1921, and became secretary-actuary in about 1923.

Q. And you have some familiarity, I believe, with Section 172 of the Charter of the City and County of San Francisco? A. Yes, I have.

Q. I understand you actually drafted it.

A. Yes. The section originally was drafted when the so-called new charter was adopted in 1932, and it has been amended since then, of course.

Q. In the Retirement Board, do you have any occasion to have any familiarity with records concerning Workmen Compensation payments?

A. Yes, I have. I personally administered the benefit provisions of the code with respect to City and County employees beginning in 1932.

Q. You have administered the benefits since 1932? A. That's right.

Q. Do you have in your official records any [13] record pertaining to Captain Philip Francis Moholy for the year 1949?

A. Yes, we have the records dealing with him and particularly beginning with August, 1949.

Q. Will you state what your records show?

A. Our records show that he was injured on

(Testimony of Ralph R. Nelson.)

August 24, 1949, while in performance of duty and that he was treated at the San Francisco Hospital, in Ward 1, which was under the jurisdiction of the Retirement System, and the treatment being furnished in line with the Labor Code.

Q. And who pays for the hospitalization and other expenses, such as doctors?

A. The City and County paid for it through the Retirement Office, appropriations being made to us and payment being made directly from our appropriation to the City and County of San Francisco, and particularly the hospital.

Q. In a conversation the other day on the telephone, you stated that you had charge of administering the Workmen Compensation benefits by virtue of a resolution of the Retirement Board, is that right? A. That's right.

Q. And is this document that you have just handed me a true copy of the resolution?

A. Yes. There are two resolutions. First, the resolution adopted July 26, 1932, under the so-called new charter becoming effective in January of [14] 1932.

Q. That is under Section 172?

A. That's right. Which authorized me as secretary-actuary at that time to administer the compensation law as it applied to City and County Employees.

Then when my status changed in 1946 to that of consulting actuary, a resolution was adopted on April 3, 1946, giving or extending this same author-

(Testimony of Ralph R. Nelson.)

ity to me in my new status, and these two sheets here give—these are certified copies of those two resolutions.

Mr. Sherwood: I would like to offer, Your Honor, the original of the two resolutions which the witness has just testified to as the basis for his authority under the Charter for administering the Workmen Compensation provisions of the Labor Code.

The Court: So received.

(Thereupon resolutions of Retirement Board were received in evidence and marked Plaintiff's Exhibit No. 11.)

Q. (By Mr. Sherwood): Do you make a report to the Industrial Accident Commission of cases involving disability payments covered by the Labor Code?

A. We file a medical report on the Industrial Accident Commission's Form No. 21, and did file it in this case, and we——

Q. Before you came to court we put into evidence this copy. [15] I wonder if this is the same one you refer to—you probably have the original (handing to witness).

A. Yes, it is. I have a copy signed by the physician himself, that is, Dr. Roberts, who made that out.

Mr. Sherwood: That is Plaintiff's Exhibit No. 10, Your Honor. I didn't know whether the copy would be accepted or not, and I asked the witness to

(Testimony of Ralph R. Nelson.)

bring the original. But there is no use in putting it in evidence.

You may cross-examine.

Cross-Examination

By Mr. Blackstone:

Q. Mr. Nelson, your testimony relates only to the disability payments made to Mrs. Moholy, is that correct? Did you have anything to do with the sick leave payments?

A. No. We had nothing to do with the sick leave payments, but I was testifying as to the jurisdiction of the Retirement Board over this case from the beginning.

Q. Well, you were talking about payments made to Mr. Moholy for injuries received in the line of duty, is that correct?

A. Well, actually I didn't talk about payments made to him. I talked about payments made in his behalf for medical and hospital service under the Labor Code. Now, under——

Q. Are you talking about payments arising from injury resulting from the performance of his duty?

A. That's right. [16]

Mr. Blackstone: I have no further questions.

(Witness excused.)

Mr. Sherwood: I think that's the plaintiff's case, Your Honor.

The Court: Very well.

Mr. Blackstone: May it please the Court, the Government has no witnesses. As I indicated earlier, we believe this comes down to a question of law.

Mr. Sherwood: May I interrupt just one moment, counsel? Mr. Lewis reminds me that on the matter of the recomputation of the amount to be refunded in the event the Court decides either of our contentions in favor of the plaintiff—I discussed the matter with Mr. Blackstone the other day and he has the original income tax return; I find that the figures that I have in my complaint are erroneous by a few dollars and the figures set forth in the answer are correct.

The Court: In the answer?

Mr. Sherwood: In the answer. Perhaps the original return should be put in evidence.

The Court: I don't think it is necessary.

Mr. Blackstone: I don't think it is necessary.

Mr. Sherwood: Mr. Blackstone suggested we stipulate after the Court renders a decision that he and I will agree upon computations to be submitted to the court; in other words, we can make the computations pursuant to any findings [17] that the Court makes and submit them to the Court.

Mr. Blackstone: In the event there is a decision for the plaintiff.

Mr. Sherwood: In the event there is a decision for plaintiff. Well, I assumed there would be.

The Court: You may be assuming something not in evidence.

I would like a little brief on this matter. Do you

vant to take ten, five and ten, or do you want more ime?

Mr. Blackstone: I would like to have a little nore time to consult—Washington did indicate that f they did have further time to reflect on it, they night be able to concede the disability payment ssue, but not the sick leave, and I thought that if perhaps we had, say, 30 days from today to get our rief in, giving Mr. Sherwood 15 days, Washington ould have an opportunity to review this, and it night decide that it was advisable to withdraw any pposition to the refund based upon the disability ayments, but I am quite confident they will not vithdraw their opposition to a refund based on the ick leave payments.

The Court: Is that satisfactory?

(Matter submitted on briefs on 15-15 and 5 days.)

[Endorsed]: Filed October 17, 1955.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, C W. Calbreath, Clerk of the United States District Court for the Northern District of Califorıia, do hereby certify the foregoing and accompanyng documents and exhibits, listed below, are the originals filed in this Court in the above-entitled case and they constitute the record on appeal herein as designated by the attorneys for the appellants:

Complaint.

Answer.

Stipulation for the Substitution of Party Plaintiff.

Order of Substitution of Party Plaintiff.

Order for Judgment.

Memorandum Opinion.

Judgment.

Notice of Appeal.

Appeal Bond.

Appellants' Designation of Record.

Reporter's Transcript of Trial Proceedings, November 30, 1954.

Plaintiff's Exhibits 1, 2, 4, 5, 6a, 7a, 8, 9a, 10 and 11.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court, this 19th day of October, 1955.

[Seal] C. W. CALBREATH,
Clerk.

By /s/ MARGARET P. BLAIR.

[Endorsed]: No. 14912. United States Court of Appeals for the Ninth Circuit. Anne G. Moholy, as Administratrix of the Estate of Philip F. Moholy, Deceased, and Anne Moholy, Appellant, vs. United States of America, Appellee. Transcript of Record. Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed: October 24, 1955.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 14912

ANNE G. MOHOLY, as Administratrix of the Estate of PHILIP F. MOHOLY, Deceased, and ANNE MOHOLY,

Appellants,

vs.

UNITED STATES OF AMERICA,

Respondent.

POINTS ON WHICH APPELLANTS RELY

1. That the District Court of the United States for the Northern District, Southern Division, in Civil No. 33489, erred in excluding Four Hundred Eighty-nine and 17/100 Dollars ($489.17) from gross income, under Section 22(b)5 of the Internal Revenue Code as it existed in 1941, received as sick pay by Philip F. Moholy, deceased, who was ill with bronchitis and unable to work for a period of 35 days. This money was paid him pursuant to the provisions of San Francisco City Charter, Ordinances and Regulations.

SHERWOOD & LEWIS,

By /s/ JOHN V. LEWIS,
Attorneys for Appellants.

Affidavit of Service by Mail attached.

[Endorsed]: Filed October 26, 1955.

No. 14,912

IN THE

United States Court of Appeals

For the Ninth Circuit

ANNE G. MOHOLY, as Administratrix of the Estate of Philip F. Moholy, Deceased, and ANNE MOHOLY,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

Appeal from the United States District Court for the Northern District of California, Southern Division.

APPELLANTS' OPENING BRIEF.

CLYDE C. SHERWOOD,
Box 3, Mountain Ranch, California,
Attorney for Appellants.

JOHN V. LEWIS,
703 Market Street, San Francisco 3, California,
Of Counsel.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO

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No. 14,912

IN THE

United States Court of Appeals
For the Ninth Circuit

ANNE G. MOHOLY, as Administratrix of the Estate of Philip F. Moholy, Deceased, and ANNE MOHOLY,
Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

Appeal from the United States District Court for the Northern District of California, Southern Division.

APPELLANTS' OPENING BRIEF.

OPINION BELOW.

The memorandum opinion of the District Court (R. 14-19) is reported in 132 F. Supp. 32.

JURISDICTION.

The appeal involves Federal income taxes for the calendar year 1949.

On March 14, 1953, within the time allowed by law, appellants filed a claim for refund in the sum of $209.00 together with interest thereon. This claim for refund was not granted by the Commissioner, and after the elapse of more than six months, as provided in Section 3772 of the Internal Revenue Code, this action was brought in the District Court by the filing of a complaint on April 13, 1954, seeking recovery of this amount. (R. 3-9). The jurisdiction of the District Court rested on 28 U.S.C., Section 1340.

On August 3, 1955, the District Court gave a judgment in favor of the plaintiffs in the sum of $134.00 together with interest thereon in the sum of $42.99 without costs and gave judgment in favor of the defendant, United States of America, on the remainder of the plaintiffs' claim. Notice of appeal was filed on September 22, 1955. (R. 21.) The jurisdiction of this court is invoked under 28 U.S.C., Section 1291.

QUESTION PRESENTED.

Whether under Section 22(b)(5) I.R.C., then in effect, sick benefits paid in 1949 to Captain Philip F. Moholy, a fireman, by his employer, the City and County of San Francisco, pursuant to the terms of its charter and the regulations thereunder, should be excluded from gross income as amounts received through health insurance as compensation for sickness.

STATUTE AND REGULATIONS INVOLVED.

The applicable provisions of the statute and regulations are set forth in Note 1 Appendix, *infra.*

STATEMENT OF THE CASE PRESENTING THE QUESTIONS INVOLVED AND THE MANNER IN WHICH THEY ARE RAISED.

The facts of this case are not in dispute. During the year 1949 Philip F. Moholy was employed by the San Francisco Fire Department with the rank of Captain. On August 24, 1949, while answering a fire alarm, he was thrown from a fire truck and sustained serious personal injury. He was placed in Ward A of the San Francisco Hospital and his hospital and medical expenses were paid by the retirement board of the City and County of San Francisco. He also received disability pay, during the period he was unable to work, in the sum of $900.00. During the same year, Captain Moholy suffered from bronchitis and was ill and unable to work for a period of 35 days. Pursuant to the provisions of the charter, ordinances, and regulations of the City and County of San Francisco, he received sick pay during the period in which he was unable to work. The total amount received by Captain Moholy as sick pay during the year 1949 was $489.17. Plaintiffs claimed in their complaint that the sum of $900.00 constituted "amounts received under Workmen's Compensation Acts as compensation for personal injuries", and that the sum of $489.17 constituted "amounts received through accident or health

insurance". After the trial, the District Court requested Counsel to file briefs, and in the defendant's reply brief it conceded that the sum of $900.00 was received under Workmen's Compensation Acts as compensation for personal injuries, and the District Court gave judgment for the plaintiffs on that issue.

The District Court held that the sum of $489.17 received as sick pay while Captain Moholy was ill from bronchitis was not excludible from gross income as "amounts received through accident or health insurance", and gave judgment for the defendant on that issue. Plaintiffs appealed from that portion of the judgment.

STATEMENT OF POINTS TO BE URGED.

Appellants' only point on appeal is that the District Court erred in refusing to exclude from the gross income of Philip F. Moholy for the year 1949 the sum of $489.17 received as sick pay pursuant to the provisions of the city charter of the City and County of San Francisco and the ordinances, regulations, and rules made pursuant thereto.

SUMMARY OF ARGUMENT.

The sick pay provisions of the charter of the City and County of San Francisco and the ordinances, regulations, and rules made pursuant thereto constitute a plan of health insurance. Section 22 of the California Insurance Code defines insurance as "a

contract whereby one undertakes to indemnify another against loss, damage or liability arising from a contingent or unknown event." The circumstances under which Captain Moholy received sick pay contain all of the essential elements of insurance as thus defined. The charter of the City and County of San Francisco is State Law enacted by the State Legislature. Section 153 of the charter was implemented by rule 32 of the Civil Service Commission. Section 11 of that rule specifically gives the Fire Department power to make regulations governing sick pay. Pursuant to such power, the Fire Commission of the City and County of San Francisco adopted the rules designated as "Sick Rule." The pertinent provisions of the so-called "Sick Rule" are set forth in Sections 406 to 431 inclusive of the rules of the Fire Department. (Appendix Note 2.) The rules of the Civil Service Commission and the rules of the Fire Department adopted pursuant to the rules of the Civil Service Commission have the effect of law and confer upon the employee a right which is enforceable at law. The various requirements of the "Sick Rule", such as a requirement for medical reports, immediate notice to the insurer, disqualification for sickness caused by misconduct, are all consistent with a system of health insurance. The system of health insurance set up by law for firemen working for the City and County of San Francisco constitutes a definite plan of insurance and is more unassailable than the sick benefit plans of private companies which have been held to constitute insurance benefits in all three of the cases which have been decided on this question.

ARGUMENT.

THE SICK PAY PROVISIONS OF THE CHARTER OF THE CITY AND COUNTY OF SAN FRANCISCO AND THE ORDINANCES, REGULATIONS AND RULES MADE PURSUANT THERETO CONSTITUTE A PLAN OF HEALTH INSURANCE AND BENEFITS RECEIVED THEREUNDER MUST BE EXCLUDED FROM GROSS INCOME UNDER THE PROVISIONS OF SECTION 22(b)(5) I.R.C.

The term "Health Insurance" is not defined in the statute, nor is the generality of the term limited by any other words or provisions in the law. The words "Health Insurance" do not require or imply that the insurance must be issued by a duly licensed insurance company, that it must be evidenced by a policy of insurance, nor that a premium must be collected from the insured. Section 22 of the California Insurance Code defines insurance as a contract whereby one undertakes to indemnify another against loss, damage or liability arising from a contingent or unknown event. It follows that health insurance is a contract whereby one undertakes to indemnify another against loss arising from sickness. Any enforceable obligation whether evidenced by a policy, a contract or a charter provision or regulation adopted pursuant thereto, whereby one undertakes to indemnify another against loss arising from a contingent or unknown event, constitutes insurance.

The sum of $489.17 was paid to Captain Moholy while he was ill with bronchitis pursuant to Section 153 of the charter of the City and County of San Francisco, Rule 32, Section 11 adopted by the Civil Service Commission and the sick leave rules of the Fire Department, all of which are set forth in full

n Note 2 of the Appendix, *infra.* It is well settled hat the charter of the City and County of San Fran-isco is State Law effective only when enacted by the State Legislature. *Yosemite, etc., Corporation v. State Board of Equalization* (1943) 59 C.A. 2d 39, 138 P. d 39; *C. J. Kubach Company v. McGuire* (1926) 199 Cal. 215, 248 Pac. 276. The rules of the Civil Service Commission and the rules of the Fire Department dopted pursuant to the rules of the commission have he effect of law and confer upon the employee a ight which is enforceable at law. *Adams v. City and County of San Francisco* (1949), 94 C.A. 2d 586. All ick leaves granted or denied to a fireman by the bat-alion chiefs are subject to review by the department hysician. The fireman is specifically given the right o appeal to the Civil Service Commission under the rovisions of Section 8, Rule 32 of the rules of the ivil Service Commission.

The trial court oversimplified the issue as shown by he following extract from the opinion: " 'Sick leave vith full pay' is an ordinary, well-understood phrase. Health insurance' is likewise an ordinary, well-un-erstood phrase. Taking their ordinary meaning, they re not the same. Sick leave pay is just not 'amounts eceived through health insurance'." This superficial nalysis completely misses the point. No one contends hat sick leave with pay is synonymous with health nsurance. Many employers give their employees full ay during periods of illness under circumstances or rrangements which would not qualify such payments s amounts received through health insurance. How-

ever, when all of the requisites of health insurance are met there is no reason why the benefits cannot equal the full pay of the employee. Where, as in this case, an employer for a valuable consideration agrees to assume the risk of loss by entering into a legally enforceable undertaking to pay the employee compensation for sickness, all of the requisites for health insurance have been met. Such payments do not lose their character as benefits from health insurance merely because their amount is measured by the employee's regular rate of pay. This view has received the support of the Commissioner of Internal Revenue on at least three occasions. Note 3 Appendix, *infra.*

Appellants' interpretation of the meaning of health insurance as used in the statute is supported by every reported decision except the memorandum opinion of the court below.

Our interpretation of the meaning of "Insurance" is the interpretation given by the United States Court of Appeals for the Seventh Circuit in the case of *Epmeier v. U.S.* (1952), 199 F. 2d 508, 42 A. F. T. R. 716. The employer in the *Epmeier* case was a private corporation instead of a political subdivision of the state as in this instant case. With this immaterial difference, everything said in the *Epmeier* case is equally applicable to the issue before this court, and we therefore wish to set forth in full the discussion in the opinion of the Circuit Court of Appeals, at page 509:

> "(1) Insurance, of ancient origin, involves a contract, whereby, for an adequate consideration,

one party undertakes to indemnify another against loss arising from certain specified contingencies or perils. Fundamentally and shortly, it is contractual security against possible anticipated loss. Risk is essential and, equally so, a shifting of its incidence from one to another. Physicians' Defense Co. v. Cooper, 9 Cir., 199 F. 576; Jordon v. Group Health Ass'n, 71 App. D.C. 38, 107 F.2d 239; Old Colony Trust Company v. Commissioner of Internal Revenue, 1 Cir., 102 F. 2d 380; Alliance Ins. Co. v. City Realty Co., D. C., 52 F. 2d 271; Meyer v. Building & Realty Co., 209 Ind. 125, 196 N. E. 250, 100 A. L. R. 1442; 44 C. J. S., Insurance, s 1, p. 471; 29 Am. Jur. 47, Sec. 3; 1 Bouvier's Law Dict., Rawle's Third Revision, p. 1613; Webster's International Dictionary, 2d Ed. 1942, p. 1289.

"In determining whether the benefits under consideration are within the statute and in accord with these general principles, we observe, first, that the plan under which the payments were made is not in the physical form of ordinary formal insurance contracts sold commercially, but instead is included in a company document with other subject matters having to do with the employer-employee relationship. But we know of no reason why insurance protection must be expressed in a formal policy.

"(2) True, no money was paid by the employee for the protection, but we think full and complete consideration lay in the contract of employment, by virtue of which, when the employee entered employment and passed a medical examination, he automatically became insured. In other words, the assumption of the risk involved and

indemnity against it were part and parcel of the compensation payable to the employees by the employer. We perceive of no reason why this is not as adequate a consideration for an insurance contract as a specified cash premium. We find no implication in the language of the document that the employer was providing a gratuitous benefit but, on the contrary, the intimation is that the indemnity provided supplemented and added to the terms of employment, by assuring the employees of sickness benefits under the conditions specified.

"A medical examination is a common insurance requirement. The distinction, in the plan here, between employees who did not pass and those who did is closely akin to the ordinary insurance requisites of risk measurement and assumption.

"Though, as to life insurance benefits, under the plan, each employee was required to name a beneficiary, there was no such requirement for sickness benefits, obviously, however, we think, because they were to be paid only to the employee during his lifetime. The provision for termination satisfies the normal requisite of an insurance contract, by defining the risk in terms of time. Provision is made for instances of successive illnesses, thus defining within definite limitations the total benefits for which the company agrees to be liable. It is provided that in case of payment of workmen's compensation for injuries or illness the company will not pay the benefits except to the extent of any excess in them over the compensation payments. The plan warrants no inference that the amount payable represents anything other than sickness benefits,

payable only when wages and salaries could not be earned. It makes the basis for the benefits, the length of service and compensation of the employee, factors consistent with the ordinary provisions of a formal insurance contract. The employee is required while ill, to follow the instructions of his physician or the company's physician, a provision closely akin to features of ordinary insurance, where the insurer is interested in avoiding extension of any resulting loss beyond that which can be reasonably avoided. We find in these and other provisions attributes of and incidents to insurance in every sense of the word.

"(3) Though the benefits are described as free, if the nature of the contract be given careful consideration, it is readily apparent that the word is used not in the sense of a donation or gratuity but rather with the meaning that no premium other than that included in the employee's services is to be paid. Benefits paid out under such an agreement are obviously a part of the employer's corporate operating costs, which include social security and unemployment taxes, workmen's compensation insurance, employer's liability insurance, maintenance of satisfactory working conditions and many other elements, all of which go into the make-up of the total cost. We conclude that 'free' life insurance, 'free' sickness benefits, 'free' medical facilities, as used here, mean simply that these matters are furnished as additional factors of the employee's compensation, free of any money advancement. The provisions of Section 22(b) (5) undoubtedly were intended to relieve a taxpayer who has the

misfortune to become ill or injured, of the necessity of paying income tax upon insurance benefits received to combat the ravages of disease or accident.

"(4) As we have indicated, we know of no reason why this insurance, when provided as a part of the contract of employment between employee and employer, must follow any stereotyped or conventional form. Surely there is no legal magic in form; the essence of the arrangement must determine its legal character. We conclude that the fact that there is no formal contract of insurance is immaterial, if it is clear as here, that, for an adequate consideration, the company has agreed and has become liable to pay and has paid sickness benefits based upon a reasonable plan of protection of its employees.

"The District Court was of the opinion that, though the plan was 'an incident of the employer-employee relationship as the plaintiff points out,' it did not create a contractual liability to pay 'Health insurance,' as there was no consideration for such a promise. This conclusion, it felt, was supported by the further provision that 'the contents' of the document 'may be changed from time to time as better thoughts occur.'

"We have pointed out wherein we think adequate consideration lay in the agreement of employment. Though no formal written contract of employment existed, the plan became effective, immediately and automatically, upon the employee's entering service and passing satisfactorily a medical examination. As we view it, all provisions then became binding upon the respective parties. As a consequence, if an em-

ployee became ill, he had a right to sickness benefits as a part of his contract. We do not doubt that had the employer refused payment, the employee might have enforced this liability.

"The provision that the terms of the agreement may be changed does not impinge upon the soundness of this conclusion. Employment contracts are always subject to revision. If the terms of such changes are not satisfactory to the employee, he may terminate his service; he can not be forced to work under conditions repugnant to his sense of what is fair and proper. It is obvious, also, we think, that no change could be made to defeat or lessen the liability, once it had attached. In the provisions lies the implicit agreement to pay the benefits until and unless the terms should be modified; no such modification could reduce the liability for sickness benefits after illness had intervened.

"We conclude that the amount paid the taxpayer for sickness benefits was exempt from income tax under the statute. The judgment is reversed with directions to proceed in accord with the announcements herein contained."

The court below attempts to distinguish the *Epmeier* case by saying "I do not read *Epmeier* as holding that all payments by an employer of full pay when the employee is on sick leave are excludible from gross income." Of course no one reads *Epmeier* as holding that *all* payments by an employer of full pay when the employee is on sick leave are excludible from gross income. However, when such payments are made under a plan of health insurance they are excludible.

The court below also adverts to the fact that Epmeier's employer was an insurance company.

It is respectfully submitted that there is not one word in the opinion in the *Epmeier* case which indicates that the decision was affected in any way by the fact that the employer was an insurance company. Unfortunately, the court below did not have the benefit of two subsequent district court cases which follow and support the *Epmeier* decision. In each case the employee involved worked for a telephone company and not an insurance company. In *Arthur E. Herbkersman v. U. S.* (1955), 133 Fed. Supp. 496, the plaintiff was an employee of American Telephone and Telegraph Company. The employer had a plan whereby it undertook to pay certain definite amounts to its employees where they were disabled by accident or sickness. All employees who have completed two years of employment are eligible for sickness or accident benefits under the plan, the amount and duration of such benefit payment being determined by the salary and length of service of the employee. We believe there is no material difference between the plan of the American Telephone and Telegraph Company and that of the City and County of San Francisco involved here. Certainly, the following statement by the court is equally applicable to this case:

> "Insurance requires an undertaking, a consideration, a consideration therefor, and a transfer of risk. Section 1 of the Plan very definitely and decisively states that the Company 'undertakes

to provide for the payment of definite amounts to its employees when they are disabled by accident or sickness'.

"Under the Plan the employer undertakes to assume the risk which would otherwise be borne by the employee of loss of income during periods of disability resulting from sickness and the risk is thereby transferred from the employee to the employer and this transfer of risk creates in itself a contract of insurance. While no monetary consideration is paid by the employee for the protection afforded under the Plan the acceptance of employment with the Plan being a feature thereof constitutes a full and adequate consideration. Consideration need not necessarily be a transfer of money, it may be anything of value.

"It was held in Epmeier v. U. S. 199 F.2d 508 (4) (7th Cir.) (42 AFTR 716) involving an employees' benefit plan similar in some respects to the one here in question that where employer for adequate consideration agreed and became liable under agreement to pay, and did pay, sickness benefits to an employee, based on a reasonable plan of protection to employees, employee was entitled to benefits of provision of Internal Revenue Code excluding from gross income and exempting from taxation amounts received through health insurance as compensation for sickness, notwithstanding there was no formal contract of insurance."

In *Haynes v. U. S.* (Jan. 28, 1955), U. S. District Court, N.D. of Ga., Atlanta Division, No. 5001 (unreported except in 1955 Prentice-Hall Federal Tax Service, p. 72, 535), the court made a similar hold-

ing in a case involving an employee of the Southern Bell Telephone and Telegraph Company. In that case the defendant argued that the payments received by the employee were additional compensation or compensation for past services. The court held:

> "The $2100.00 received by the Plaintiff, Gordon P. Haynes, from which the $318.44 income tax was withheld, was paid to him as sick benefits and constituted amounts 'received through health insurance as compensation for sickness' within the meaning of Title 26, U.S.C.A. Sec. 22(b)(5), and the inclusion of such amount in the gross income of plaintiffs was improper.
>
> "The view of the defendant that the payments were 'additional compensation' or 'compensation for past services' does not find support in the record.
>
> "The employer becomes the insurer and the benefits are paid only when the employee is ill—if he is not ill, he does not receive them.
>
> "Only the value of the protection may be properly treated as additional compensation or income—not the benefits which depend not upon service, but upon duration of illness.
>
> "It was held in Epmeier v. United States, 199 F.2d 508(4) (7th Cir.) (42 AFTR 716):
>
> > 'Where employer for adequate consideration agreed and became liable under agreement to pay and did pay, sickness benefits to an employee based on a reasonable plan of protection to employees, employee was entitled to benefits of provision of Internal Revenue Code excluding from gross income and exempting from

> taxation amounts received, through health insurance as compensation for sickness, notwithstanding there was no formal contract of insurance.'
>
> "This question has thus been decided adversely to the contentions of the defendant and it seems that the Commissioner of Internal Revenue has refused to follow that holding (See 39 A.B.A. 450), although that opinion seems to this Court to be sound."

We can find little to add to the language used in ne *Epmeier* case. Every argument advanced by the ppellee in the court below is carefully analyzed nd answered in the *Epmeier* opinion. With the imaterial difference that the employer in the *Epmeier* ase was a private insurance corporation and the emloyer in this case is a political subdivision, everyiing said in the *Epmeier* opinion is equally applicable o the issue before this court, and we believe that the pinion which we have set forth above constitutes a lear and cogent presentation of the principles aplicable to the instant case.

CONCLUSION.

For the foregoing reasons the portion of the judgnent of the District Court from which this appeal is aken should be reversed and remanded to the Disrict Court with directions that the District Court nter judgment for appellants and against the de-

fendant in accordance with the prayer of the complaint.

Dated, San Francisco, California,
January 30, 1956.

CLYDE C. SHERWOOD,
Attorney for Appellants.

JOHN V. LEWIS,
Of Counsel.

(Appendix Follows.)

Appendix.

Appendix

NOTE 1. Plaintiffs' claim is based upon Section (b)(5) of the Internal Revenue Code which read as lows during the year involved in this action:

"I.R.C. Sec. 22

"(b) *Exclusions from Gross Income.* The following items shall not be included in gross income and shall be exempt from taxation under this chapter:

"(5) *Compensation for injuries or sickness. Except in the case of amounts attributable to (and not in excess of) deductions allowed under section 23(x) in any prior taxable year,* amounts received, through accident or health insurance or under workmen's compensation acts, as compensation for personal injuries or sickness, plus the amount of any damages received whether by suit or agreement on account of such injuries or sickness, *and amounts received as a pension, annuity, or similar allowance for personal injuries or sickness resulting from active service in the armed forces of any country.*" (Emphasis added.)

NOTE 2. The Charter provision and rules governing e payment of sick benefits to firemen by the City d County of San Francisco are as follows:

Charter of the City and County of San Francisco, ction 153:

"*Section 153.* The civil service commission by rule and subject to the approval of the board of supervisors by ordinance, shall provide for leaves of absence, due to illness or disability, which leave

or leaves may be cumulative, if not used as authorized, provided that the accumulated unused period of sick leave shall not exceed six (6) months, regardless of length of service, and provided further that violation or abuse of the provisions of said rule and ordinance by an officer or employee shall be deemed an act of insubordination and inattention to duties."

Pursuant to the authority given in Section 153 of the *Charter,* the Civil Service Commission adopted Rule 32. Section 11 of Rule 32 reads as follows:

"Section 11. **Police and Fire Departments.** Sick leaves and disability leaves granted to members of the uniformed forces of the Police Department and Fire Department shall be regulated by rules adopted respectively by the Police Commission and Fire Commission which rules, and amendments thereto, shall be subject to the approval of the Civil Service Commission, and when so approved by the Civil Service Commission shall be deemed as included in this rule. (Sick leave rules of the Fire Department approved Minutes of April 18, 1945. Sick leave rules of the Police Department approved as amended Minutes of February 15, 1950.)"

During the year 1949 the Fire Commission of the City and County of San Francisco maintained in full force and effect Sections 406 through 431 of the rules of the Fire Department entitled "Sick Rule" as follows:

"SICK RULE

406. The officers and members of the uniformed force of the Department shall be entitled

to sick leaves and disability leaves with full pay subject to the provisions of this rule as hereinafter defined, and all other employees of the Department shall be entitled to sick leaves and disabilities in accordance with the provisions of Rule 32 of the Rules of the Civil Service Commission.

407. A leave of absence granted under this rule, with full pay because of illness or injury, and not covered by Section 408 of this rule, shall be known as 'Sick Leave.'

408. A leave of absence granted under this rule, with full pay, for one of the following causes, shall be known as 'Disability leave':

a. Absence due to quarantine established and declared by the Department of Public Health or other competent authority, and shall be for the period of quarantine only.

b. Absence necessitated by death of mother, father, husband, wife, child, brother, or sister; provided that in such case the leave shall not extend beyond the date of burial of said deceased person.

c. Absence necessitated by death of other relatives; but leave with pay in such cases shall be for not more than one day to permit attendance at the funeral of said person.

d. Absence due to disability caused by illness or injury arising out of, and in the course of, employment.

409. Members of the Department who have regularly occupied their positions continuously for at least one year shall be entitled to two weeks' sick leave with full pay, annually, during their employment in the Department. Such annual sick

leave of two weeks, with pay, when not used, shall be cumulative, but the accumulated unused period of sick leave shall not exceed six months regardless of length of service.

410. Members of the Department shall be entitled to an accumulation of two weeks' sick leave with pay for each year of service, until the maximum of six months' accumulation has been reached, provided that when said maximum accumulation of six months has been reached, and thereafter part of said maximum has been used, the used part of said maximum may again be replenished at the rate of two weeks for each subsequent year of service. Sick leaves with pay allowed since the present Charter became effective on January 8, 1932, shall be deducted from above mentioned accumulations.

411. Members of the Department who are absent from duty because of disability arising out of and in the course of employment shall be entitled to full pay; the extent of such absence to be determined by the Board of Fire Commissioners.

412. The benefits obtainable under this rule shall automatically terminate on the date of retirement on pension of such members receiving benefits thereunder.

413. Sick leave with pay granted under this rule shall be indicated on pay rolls and time sheets by the letters 'S.P.' (sick leave with full pay); and disability leaves with pay granted under this rule shall be indicated on pay rolls and time sheets by the letters 'D.P.' (disability leave with full pay).

414. When a member of the Department becomes sick or disabled to such an extent as to render him unable and unfit to properly perform his required duties in the Department, he shall report the fact, or cause the same to be properly reported to the officer of the company to which he may be detailed at the time for duty. The officer receiving such report shall immediately notify his Battalion Chief then on duty, who shall promptly investigate the same and, if he deems it necessary, shall grant said member a sick leave. All such leaves, when granted, shall be immediately reported to the Bureau of Assignments together with the member's address and all other available pertinent information. The assignment officer shall record the facts as reported and in turn shall report the same to the Department Physician.

415. When a member of the Department applies for a disability leave as defined in Paragraphs (a), (b) and (c) of Section 408 of this rule, an application in writing and addressed to the Board of Fire Commissioners must be submitted, and the same shall be investigated and if in order, indorsed by the company officer and Battalion Chief.

416. When a member of the Department, while on duty, receives an injury or disability arising out of and in the course of employment as defined in Paragraph (d) of Section 408 of this rule, the officer of the company to which he belongs or to which he may be detailed for duty at the time, shall immediately notify his Battalion Chief then on duty, and shall make out a written report in duplicate, covering all facts in the case, and the

Battalion Chief shall make a thorough investigation of the same, and, if circumstances warrant, he shall indorse and forward one copy of the report to the Chief of Department. An entry regarding such injury or disability shall also be made in the company journal.

417. If the injury or disability received by said member is of such extent as to render him unable or unfit to properly perform his required duties in the Department, the Battalion Chief shall grant him a disability leave and report the same to the Bureau of Assignments together with the member's address and all other pertinent information. The officer at the Bureau of Assignments shall record the facts as reported and in turn shall report the same to the Department Physician.

418. When a member of the Department, while off duty, receives an injury, or becomes sick to such an extent as to render him unable or unfit to properly perform his required duties in the Department, he shall report the fact, or cause the same to be properly reported to the officer of the company to which he is assigned or to which he may be detailed for duty at the time. The officer receiving such report shall immediately notify his Battalion Chief then on duty, who shall promptly investigate the same and, if the circumstances warrant, he shall grant said member a sick leave.

419. All such sick leaves when granted, shall immediately be reported to the Bureau of Assignments together with the member's address and all other available pertinent information, and the assignment officer in turn shall report the same to the Department Physician.

420. It shall be the duty of the Department Physician to visit all members who have been granted sick leaves or disability leaves and who are confined to bed, as soon as possible after having been advised thereof by the Bureau of Assignments, and investigate the nature of the illness or injury, and in the event of any violations of these rules or other irregularities encountered by him, he shall consult with the Chief of Department and, if required, shall render a written report thereon. All sick leaves or disability leaves granted or denied to a member by Battalion Chiefs in compliance with the provisions of Sections 414 to 418 of this rule shall be subject to review by the Department Physician, and nothing herein contained shall abrogate the right of a member to appeal to the Civil Service Commission under the provisions of Section 8, Rule 32, Rules of the Civil Service Commission.

421. Any member of the Department who has been granted a sick leave or disability leave and whose illness or disability does not necessarily confine him to his home or to a hospital shall report in person to the Department Physician within forty-eight hours and as often thereafter as the Department Physician may direct.

422. All members of the Department who have been granted a sick leave or disability leave shall within forty-eight hours, and weekly thereafter, file with the Department Physician a certificate from a regularly certificated physician clearly stating the nature of the sickness or disability.

423. Except in cases of emergency, no member of this Department shall submit to a surgical operation as a result of which he would be prevented

from performing his required duties in a satisfactory manner, until after permission from the Department Physician.

424. Any member who becomes sick or disabled through intemperance, vicious habits, immoral or unlawful acts or through the reckless negligence of his person or health, shall not be entitled to any salary or compensation from this Department during such sickness or disability.

425. Members off duty on sick or disability leave shall not be permitted to leave the City without having obtained the consent of the Board of Fire Commissioners.

426. No member off duty on sick leave or disability leave, as defined in Paragraph (d) of Section 408 of this rule, shall be absent from his residence or place of confinement after 8 o'clock P. M., except by permission of the Chief of Department.

427. Company officers shall immediately report to their respective Battalion Chiefs then on duty, whenever a member of their respective companies who had been off duty on sick leave or disability leave reports back for duty, and the Battalion Chief to whom the report is made shall immediately notify the Bureau of Assignments who shall record the same and shall in turn relay the report to the Department Physician.

428. Violation or abuse of any of the provisions of these rules by any member of the Department shall be deemed an act of insubordination and inattention to duties.

429. Battalion Chiefs shall, within forty-eight hours and once in each week thereafter, visit all

members of the Department to whom they have granted sick leaves or disability leaves, provided that said members reside or are located in their battalion districts and further provided that their sickness or disability confines them to their homes or to a hospital. When such members reside or are confined outside the boundaries of their respective districts, they shall immediately, after granting such sick leave or disability leave, notify the Battalion Chief of the district in which said sick or disabled member resides or is confined, and the latter Battalion Chief shall proceed to visit such members as heretofore provided.

430. When a member who has been granted a sick leave or disability leave fails to comply with the provisions of these rules, or fails to obey the orders or directions of the Department Physician, the Battalion Chief in whose district said member resides or is confined shall investigate the circumstances and shall exact strict compliance or file a formal complaint, as the case may warrant.

431. Battalion Chiefs shall submit once a week to the Department Physician a list of all members of their respective districts or who reside or are located therein while on sick leave or disability leave, noting particularly the correct address and whether or not they are confined to bed."

NOTE 3. The Commissioner held, "Unemployment mpensation disability benefits received by em- yees pursuant to Article X of the California employment Insurance Act as amended are cludible from gross income under Section 22)(5) of the Internal Revenue Code." (IT 4015

CB 1950-1, page 23.) He also held, "An employer's private plan for the payment of disability benefits to employees pursuant to Chapter 21, Title 43 of the Revised Statutes of New Jersey as amended and supplemented is a form of health and accident insurance which meets the requirements of Section 22(b)(5) of the Internal Revenue Code. Amounts received by employees under such a plan are excludible from gross income under Section 22(b)(5) of the Code and are not subject to the withholding of income tax at the source on wages under Section 1622 of the Code." (IT 4000 CB 1950-1, page 621.) He also held in regard to New York disability benefits, "It is held that disability benefit payments to employees whether made from the state insurance fund, by an insurance company pursuant to an insurance contract, or under an improved self-insured plan are excludible from gross income of the recipients under Section 22(b)(5) of the Internal Revenue Code as 'amounts received, through accident or health insurance * * * as compensation for personal injuries or sickness' and do not constitute wages for purposes of withholding of income tax at the source." (IT 4060 CB 1951-2, page 11.) However, the following year the Commissioner reversed his position in IT 4107 CB 1952-3, page 73.

No. 14,912

IN THE

United States Court of Appeals

For the Ninth Circuit

ANNE G. MOHOLY, as Administratrix of the Estate of Philip F. Moholy, Deceased, and ANNE MOHOLY,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

On Appeal from the Judgment of the United States District Court for the Northern District of California.

BRIEF FOR THE APPELLEE.

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ANNE G. MOHOLY, as Administratrix of the Estate of Philip F. Moholy, Deceased, and ANNE MOHOLY,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

On Appeal from the Judgment of the United States District Court for the Northern District of California.

BRIEF FOR THE APPELLEE.

OPINION BELOW.

The memorandum opinion of the District Court (R. 14-19) is reported in 132 F. Supp. 32.

JURISDICTION.

This appeal involves income taxes for the calendar year 1949. The amount originally sued for was $209, which was paid on or before March 15, 1950. (R. 80.)

Claim for refund was filed on March 14, 1953. (R. 7-9.) More than six months having elapsed without action by the Commissioner on the claim for refund (R. 6, 11), on April 13, 1954, the taxpayers brought an action in the District Court for recovery of the taxes paid, within the time provided by Section 3772 of the Internal Revenue Code of 1939 (R. 3-9). Jurisdiction was conferred on the District Court by 28 U.S.C., Section 1346. On August 4, 1955, judgment was entered for the taxpayers by the District Court in the amount of $134, plus interest. (R. 20-21.) Within sixty days and on September 22, 1955, a notice of appeal was filed by the taxpayers. (R. 21.) Accordingly the amount of federal income taxes here involved is $75. This Court has jurisdiction in this matter by reason of 28 U.S.C., Section 1291.

QUESTION PRESENTED.

Whether $489.17 paid in 1949 to taxpayer as "sick leave with full pay," is excludible from gross income as "amounts received through * * * health insurance" within the meaning of Section 22(b)(5) of the Internal Revenue Code of 1939.

STATUTE INVOLVED.

Internal Revenue Code of 1939:

SEC. 22. GROSS INCOME.

* * * * * * *

(b) *Exclusions from Gross Income.*—The following items shall not be included in gross income

and shall be exempt from taxation under this chapter:

* * * * * * *

(5) [as amended by Secs. 113 and 127, Revenue Act of 1942, c. 619, 56 Stat. 798] *Compensation for injuries or sickness.*—Except in the case of amounts attributable to (and not in excess of) deductions allowed under section 23(x) in any prior taxable year, amounts received through accident or health insurance or under workmen's compensation acts, as compensation for personal injuries or sickness, plus the amount of any damages received whether by suit or agreement on account of such injuries or sickness, and amounts received as a pension, annuity, or similar allowance for personal injuries or sickness resulting from active service in the armed forces of any country;

* * * * * * *

(26 U.S.C. 1952 ed., Sec. 22.)

STATEMENT.

The pertinent facts relevant to the sole issue presented here on appeal appear as follows:

The decedent, Philip Moholy (hereinafter referred to as taxpayer as is also sometimes the appellants), was, during the calendar year 1949, a captain in the fire department of the city and county of San Francisco. (R. 14.) Together with his wife, Anne Moholy, taxpayer timely filed a joint income tax return for that year with the then Collector of Internal Revenue at San Francisco, California. (R. 4.) For purposes

of filing the return, the spouses were on a calendar year cash basis of accounting. (R. 5.) Included in gross income reported was $489.17 received as sick pay for a period of 35 days during which taxpayer was ill with bronchitis and unable to work. (R. 14)[1]

As shown in the appendix to taxpayer's brief, the $489.17, here in issue, was received by taxpayer as "sick leave with full pay" pursuant to the provisions of the SICK RULE (pp. ii-ix) adopted by the San Francisco Fire Commission on April 18, 1945, and in effect during the calendar year 1949. Authorization for the granting of sick leaves, by rule of the Civil Service Commission "subject to the approval of the board of supervisors," appears in Section 153 of the charter of the city and county of San Francisco. (pp. i-ii.) Under Section 11 of Rule 32 of the Civil Service Commission, the SICK RULE here in effect (pp. ii-ix), provides, *inter alia* for "sick leaves * * * with full pay" under qualifying circumstances (p. iii). Two weeks' annual sick leave with full pay up

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[1]Actually, taxpayer had included in gross income on the 1949 joint return an additional amount of $900 received as disability pay from the city and county of San Francisco. This amount covered a period of 68 days during which he had been incapacitated by reason of being thrown from a fire truck while answering an alarm. (R. 14.) His claim for refund in the amount of $209, filed on March 14, 1953 (R. 5), was based on the contention that both this disability pay and the $489.17, here in issue, should be excluded from gross income under Section 22(b)(5) of the Internal Revenue Code of 1939 (R. 14). At the trial below, the Government conceded that the $900, received as disability pay, was properly excludible. (R. 15.) Accordingly, while the District Court held below that the $489.17, received as sick pay, was includible in ordinary income (R. 18), the judgment (R. 20-21) permitted taxpayer to recover $134, plus interest, thus, as stated, leaving $75 as the amount of tax here in dispute.

o a cumulative maximum of not to exceed six months s permitted to firemen who have been continuously mployed for one year or more. (pp. iii-iv.) Sick pay, o granted, is indicated on pay rolls and time sheets y the letters "S.P." (p. iv.) To comply with the ule, it is incumbent upon the fire department mem- er to report illness immediately to the battalion hief (p. vi), to file physician's certificates with the lepartment physician (p. vii), and to receive the prescribed visits from the department physician (p. ii) and the battalion chief (pp. viii-ix) when unable o report to the department physician in person (p. ii). Failure to comply with the rule's requirements s cause for investigation and the possible lodging of formal complaint by the battalion chief. (p. ix.)

SUMMARY OF ARGUMENT.

The continuation of taxpayer's regular salary by he San Francisco Fire Department as "sick leave vith full pay" was compensation for services which s not exempt from income tax under Section 22(b) (5) of the Internal Revenue Code of 1939 as "amounts eceived through * * * health insurance." Such sick eave payments, made in qualifying cases as an in- ident of the recipient's Civil Service status, do not partake of the nature of health insurance. As a prac- ical matter of common, everyday speech, the con- inuation of an employee's salary by his employer during absence on account of sickness is not known

as health insurance. Moreover, the SICK RULE of the San Francisco Fire Department, while clearly evidencing a design to function as an implementing feature of the department's compensation plan for personnel, lacks the fundamental characteristics of health insurance. Neither were the payments "amounts received through * * * health insurance" within the legislative intendment of Section 22(b)(5) of the 1939 Code. In enacting the section, Congress adopted a statutory pattern which makes no provision for the exclusion of payments such as are here before the Court. Although Section 22(b)(5) provides for an exemption from income tax, the taxpayer must bring herself clearly within its terms. This she has failed to do under the facts obtaining, the statute, and the decided cases. In addition, the established criteria which are applied administratively to test for statutory compliance clearly buttress the correctness of the District Court's decision below.

ARGUMENT.

THE DISTRICT COURT CORRECTLY HELD THAT $489.17 PAID TO TAXPAYER IN 1949 BY THE SAN FRANCISCO FIRE DEPARTMENT AS "SICK LEAVE WITH FULL PAY" IS NOT EXCLUDIBLE FROM GROSS INCOME AS "AMOUNTS RECEIVED THROUGH * * * HEALTH INSURANCE" WITHIN THE MEANING OF SECTION 22(b)(5) OF THE INTERNAL REVENUE CODE OF 1939.

We submit that the District Court correctly held (R. 18) that the sick leave pay received by taxpayer in 1949 did not qualify for exclusion from gross income as "amounts received through * * * health in-

surance" within the meaning of Section 22(b)(5) of the Internal Revenue Code of 1939, *supra*.

A. The sick leave payments herein made do not partake of the nature of "amounts received through * * * health insurance".

As a practical matter of common everyday speech, continuation of an employee's salary by his employer during absence on account of sickness is not known as health insurance. Just like the continuation of salary during vacations, it is part of the compensation paid for past and prospective services.[2] As the court below recognized (R. 18), it is a clear distortion of the statutory phrase "amounts received through * * * health insurance" to include within its meaning paid sick leave such as that before the Court. Words of a statute are to be interpreted in their ordinary and everyday meaning. *Crane v. Commissioner,* 331 U.S. 1, 6.

There can be no question but that the payment here in issue was not received through health insurance but, instead, constituted additional compensation for services. In *Beck v. Penna. R. R. Co.,* 63 N.J.L. 232, 43 Atl. 908, the defendant railroad company defended a personal injury action by one of its employees on the ground that the employee's membership in a relief fund maintained jointly by the employer and its employees released the employer from liability. The relief fund provided for the payment of definite amounts to employees disabled

[2]There is a presumption that any beneficial payment to an employee beyond his salary is additional compensation. *Van Dusen v. Commissioner,* 166 F. 2d 647, 650 (C.A. 9th).

by accidents or sickness. The court held that the contract pursuant to which the employee became a member of the relief fund was valid and operated to release the employer from liability. It rejected the employee's contention that the contract was prohibited by provisions of the New Jersey laws relating to insurance. It held that the contract was not one of insurance, saying (pp. 241-242):

> A contract of similar import with a railway company which had established what was called a railway insurance society, was held by the Court of Queen's Bench to be a labor contract between employer and employe. *Clements v. L. & N.W. Railway Co.*, 2 Q.B. 482 (1894). The contract before us is *the contract of an employer with an employe respecting the compensation the latter shall receive for his labor,* and the manner in which it shall be accounted for and paid for his relief or the benefit of his beneficiaries. *The payment by the company of the expenses of management and of contributions, to make up deficiencies is in the nature of additional compensation for labor* to those of its employes who enter into this contractual relation with it. (Emphasis supplied.)[3]

Not only is paid sick leave such as that before the Court not known as health insurance in plain, ordinary, everyday speech but it lacks the fundamental characteristics of health insurance. Individual and group health insurance is not written for more than 75 per cent to 80 per cent of the insured's individual

[3]See also *Sherer v. Smith*, 85 Ohio App. 317, 320, 88 N.E. 2d 426, 428, which is in accord.

salary. Faulkner, Accident and Health Insurance (1940) states (p. 132):

> The carriers have set as the maximum limit for which coverage will be granted weekly indemnity equal to 75 or 80 per cent of the applicant's earned income. If the insured has other insurance applicable to the risk, the amount granted will be reduced accordingly. The insured is made a coinsurer to the extent of 20 per cent of his earnings in the hope that malingering will be minimized. With the insured carrying approximately one-fifth of his own risk, it becomes quite as much to his own interests as the insurance carrier's for the disability to be terminated as quickly as possible.[4]

This fundamental and practical feature of health insurance is absent from the wage continuation formula before the Court which provides (Taxpayer's Br. iii-iv) for "sick leave *with full pay*" (emphasis supplied) for as long as six months, depending on the fireman's length of service with the department.

In addition, the SICK RULE of the San Francisco Fire Department, here before the Court (Taxpayer's Br. ii-ix), clearly evidences a design to administer the wage continuation formula as an implementing feature of the department's personnel policy. Patently, such a purpose is consistent with the fact that the Fire Commission's rules are "subject to the approval of the Civil Service Commission." (Taxpayer's Br. ii.) Since the SICK RULE, at most,

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[4]Accord: Sommer, Manual of Accident and Health Insurance. 51-53.

is an administrative addendum to earlier acquired incidents of Civil Service status (which obviously included the right to appeal to the Civil Service Commission under the administrative procedure obtaining), it follows as a matter of course that "nothing herein contained shall abrogate the right * * * to appeal to the Civil Service Commission * * *." (Taxpayer's Br. vii.) That disciplinary measures taken by the department in connection with its administration of the SICK RULE might furnish grounds for a member's possible invocation of this basic appeal right may logically be inferred from the provision that no "salary or compensation" will be paid for sickness incurred "through intemperance, vicious habits, immoral or unlawful acts or * * * reckless negligence * * *" (Taxpayer's Br. viii) and the provision that, in event of a member's failure to comply with either the rules or the directions of the department physician, the battalion chief may, in warranted cases, file a formal complaint (Taxpayer's Br. ix). In other words, the SICK RULE here before the Court, unlike health insurance, is expressly administered as an integral feature of the department's *compensation* plan for its members.

On the negative side, the glaring dissimilarity between the SICK RULE and health insurance is highlighted even more when attention is directed to what the RULE does *not* provide. Limited only to the normal Civil Service right to appeal when "salary or compensation" is cut off, the RULE, unlike health insurance, provides no direct right to use for claimed

benefits. No premiums are charged. No trusteed fund or fund of any kind is maintained to provide for benefits. Obviously, the San Francisco Fire Department does not write insurance as part of its public function; neither is it licensed as a health insurer. The most that can be said is that the appropriation out of which members' salaries are paid is drawn upon, in qualifying cases, to continue full salary payment during periods of sickness.

There is, moreover, *no distribution of risk.* It is fundamental that insurance involves both "risk-shifting *and* risk-distributing." (Emphasis supplied.) *Helvering v. Le Gierse,* 312 U.S. 531, 539.[5]

If it be assumed that, under the SICK RULE, the risk that the department would not continue a member's salary during sick leave was shifted to the department, an assumption that is difficult to square

[5]Contrary to taxpayer's attempt to spell out an insurance contract within the meaning of Section 22 of the California Insurance Code (Br. 6-7), the California Supreme Court has held that a plan of defraying the expenses of medical care incurred by an organization's dues-paying members is not "disability insurance" within that definitional section. *California Physicians' Service v. Garrison,* 28 Cal. 2d 790, 172 P. 2d 4. If such a plan is not insurance under California law, *a fortiori,* sick leave pay, with no contributions being made, could not be. See the California Supreme Court's opinion, cited *supra,* where the court stated, with respect to an insurance contract's requirements that there be both a risk of loss "and an assumption of it by legally binding arrangements by another" (p. 804):

> Even the most loosely stated conceptions of insurance and indemnity require these elements. Hazard is essential and equally so a shifting of its incidence. If there is not risk, or there being one it is not shifted to another or others, there can be neither insurance nor indemnity. Insurance also, by the better view, involves distribution of the risk, but distribution without assumption hardly can be held to be insurance. [Citations omitted.]

with the insurance concept of risk-shifting, there was *no distribution* of such risk among the members. Rather, the entire cost of the sick leave pay was borne by the department's salary appropriation. The risk remained *undistributed.* As the Court of Appeals for the Second Circuit stated in *Commissioner v. Treganowan,* 183 F. 2d 288, 291, certiorari denied, *sub nom. Estate of Strauss v. Commissioner,* 340 U.S. 853:

> Risk distribution, on the other hand, emphasizes the broader, social aspect of *insurance as a method of dispelling the danger of a potential loss by spreading its cost throughout a group.* By diffusing the risks through a mass of separate risk shifting contracts, the insurer casts his lot with the law of averages. *The process of risk distribution, therefore, is the very essence of insurance.* (Emphasis supplied.)

The rationale of the District of Columbia Circuit's decision in *Waller v. United States,* 180 F. 2d 194, is closely in point. There the taxpayer urged that his retirement pay, received under a federal statute as a result of his retirement for physical disability incurred in line of duty, was actually, or in the nature of, workmen's compensation "received * * * under workmen's compensation acts, as compensation for personal injuries or sickness" within the terms of Section 22(b)(5) of the Internal Revenue Code of 1939. (P. 195.) The court rejected the taxpayer's argument and denied the claimed exemption. It said (p. 196):

> *Retirement pay is not known as workmen's compensation, nor is the latter known as the former.* Had Congress intended to exempt retirement pay

from taxation, it would not have left the effectuation of its intention to the dubious fate of rulings by administrators or courts that such pay is free of tax burden because workmen's compensation is expressly made so. (Emphasis supplied.)

Equally, continuation by the department of the member's full salary during sick leave "is not known" as health insurance, "nor is the latter known as the former."

The reasoning of the *Waller* case was incisively applied by the District Court below, as follows (R. 17-18):

> All this is interesting. But the problem is not whether the system setting up these payments is like health insurance. The problem is whether the payments are "amounts received through accident or health insurance" as those words are used in the Act. While their meaning in the statute is not free from doubt, I take it that the words were used in their ordinary service. Cf. *Waller v. U.S.*, 180 F. 2d 194 (App. D.C. 1950). "Sick leave with full pay" is an ordinary, well understood phrase. "Health insurance" is likewise an ordinary, well understood phrase. Taking their ordinary meaning they are not the same. Sick leave pay is just not "amounts received through health insurance".

B. Under the Internal Revenue Code of 1939 which is here applicable, Congress clearly did not provide for the exemption of sick leave payments such as are here before the Court.

If Congress had wished to exempt from taxation salary payments received from an employer during sick leave, it could readily have said so expressly. Indeed, it may be asked why Congress in enacting Section 22(b)(5) qualified the exemption by limiting it to amounts received as compensation for personal injuries or sickness "through accident or health insurance or under workmen's compensation acts". If Congress had intended to exempt from taxation other payments, such as those made by the San Francisco Fire Department in the present case, it could readily have done so by deleting the phrase "through accident or health insurance or under workmen's compensation acts." The section would then read, as the taxpayer, in effect, urges this Court to read it, so as to exempt "amounts received as compensation for personal injuries or sickness."

In fact, Congress recognized that salary payments made by an employer to an employee during sick leave were not amounts received through accident or health insurance or under workmen's compensation Acts when it extended the exemption of Section 22(b)(5) in 1942 to "amounts received as a pension, annuity, or similar allowance for personal injuries or sickness resulting from active service in the armed forces of any country." If, as the taxpayer contends and contrary to the holding below, the continuation of an employee's salary by the employer during sick leave constitutes amounts received through health

nsurance then there was no need for Congress to mend Section 22(b)(5) in 1942 and extend the xemption, as it did, to a limited and specified cate-ory of paid sick leave.

A statute, such as the Internal Revenue Code of 939, is to be construed as a whole and not as if each f its provisions were independent of the others.)ther pertinent provisions in the Code may be con-ulted to determine the true meaning of the statutory anguage in question. *Alexander v. Cosden Co.,* 290 J.S. 484, 496.

In this connection, Section 22(b)(1), which is sim-lar to Section 22(b)(5), furnishes a guide to the neaning of the phrase "health insurance" as used n Section 22(b)(5). Section 22(b)(1) exempted rom taxation, prior to 1951:

> (1) *Life insurance.*—Amounts received under a life insurance contract paid by reason of the death of the insured, * * *

This section was amended by Section 302 of the Revenue Act of 1951, c. 521, 65 Stat. 452, to exempt:

> (1) *Life insurance, etc.*—Amounts received—
>
> (A) under a life insurance contract, paid by reason of the death of the insured; or
>
> (B) *under a contract of an employer providing for the payment of such amounts to the beneficiaries of an employee, paid by reason of the death of the employee;*
>
> * * * The aggregate of the amounts excludible under subparagraph (B) by all the beneficiaries of the employee under all such contracts of any

one employer may not exceed $5,000. (Emphasis supplied.)

The reason for this amendment to Section 22(b)(1) of the Code is found in S. Rep. No. 781, 82d Cong., 1st Sess., p. 50 (1951-2 Cum. Bull. 458, 493):

> Section 22(b)(1) of the Code excludes from gross income amounts received under a life insurance contract paid by reason of the death of the insured, whether in a single sum or otherwise. *However,* by its terms, this provision is limited to life insurance payments, and the exclusion does not extend to death benefits paid by an employer by reason of the death of an employee. (Emphasis supplied.)

It is thus apparent that when Congress, having exempted from income tax "amounts received" under a "life insurance contract," wished also to exempt amounts received from an employer under a contract by reason of the death of an employee, it found it necessary to do so expressly. Likewise, if Congress had desired to exempt from taxation sick leave payments by an employer to an employee it would have added a subparagraph to Section 22(b)(5) similar to 22(b)(1)(B). This subparagraph might read, if patterned after Section 22(b)(1)(B), as follows:

> Amounts received—
>
> * * * * * * *
>
> (B) under a contract of an employer providing for the payment of such amounts to an employee, as compensation for injuries or sickness.

anguage might also be included limiting the aggre-
ate amount excludible, similar to that contained in
ie last sentence of Section 22(b)(1).

The parallel is striking and altogether persuasive
at sick leave paid by an employer is not health in-
rance. Otherwise, death benefits paid by an em-
loyer pursuant to contract would have been
Amounts received under a life insurance contract"
ithin the meaning of Section 22(b)(1) prior to its
mendment in 1951, and the addition of Section 22(b)
1)(B) by the Revenue Act of 1951 would have been
n empty gesture.

Indeed, Congress, in continuing recognition of the
ifference between insurance and payments, such as
iose in question, made by an employer to his em-
loyees or his employees' beneficiaries, provided in
ie Internal Revenue Code of 1954 for the prospective
xemption from income tax of amounts received
irough health insurance (Section 104(a)(3) (26
.S.C. 1952 ed., Supp. II, Sec. 104)) and amounts
aid to an employee under his employer's wage con-
nuation plan on account of sickness (Section 105(d)
26 U.S.C. 1952 ed., Supp. II, Sec. 105)). Thus, the
attern followed by Congress in 1951 in amending
ection 22(b)(1) of the Internal Revenue Code of
939 was repeated by Congress in 1954 in enacting
he successor to Section 22(b)(5) of the Internal
Revenue Code of 1939. Now amounts received by an
mployee under his employer's wage continuation
lan in 1954 and later years may be exempt from in-

come tax, subject to limitations as to amount similar to those provided when Section 22(b)(1) of the Internal Revenue Code of 1939 was amended in 1951.

As the District Court below succinctly observed (R. 18):

> If Section 105(d) of the Internal Revenue Code of 1954 has any relation to this problem at all, it shows that Congress can use plain words to exclude these types of payment from gross income.

C. The decided cases.

The issue of federal statutory construction here on appeal has not previously been passed upon by this Court. Consequently, the Seventh Circuit's decision in *Epmeier v. United States,* 199 F. 2d 508, which furnishes the keystone underpinning for taxpayer's instant appeal (Br. 8-17),[6] is not binding in this Circuit.

In the *Epmeier* case, the Lincoln National Life Insurance Company, the employer, a company having statutory authority to insure health risks, and, in fact, writing disability insurance as part of its business, had an employees' sickness benefit plan which granted

---

[6]The taxpayer also relies (Br. 14-15) on *Herbkersman v. United States,* 133 F. Supp. 495 (S.D. Ohio), now pending on appeal to the Sixth Circuit, and (Br. 15-17) on *Haynes v. United States* (N.D. Ga.), decided January 28, 1955 (1955 C.C.H., par. 9231), and now pending on appeal to the Fifth Circuit. Both of these cases were decided on the authority of *Epmeier v. United States, supra.* However, see *Branham v. United States,* 136 F. Supp. 342 (W.D. Ky.) (now pending on appeal to the Sixth Circuit), which distinguished the *Epmeier* case and held that the sick leave payments there before the court did *not* qualify for exemption under Section 22(b)(5).

kness and death benefits to eligible employees. Full-
ne salaried employees were eligible to receive bene-
s equal to a percentage of salary for a period of
ne based on length of employment. The plan stated
at, as a general rule, any employee who was sick
disabled beyond the period of time during which
e benefits were paid under the plan would not be
rther compensated, but would be removed from the
yroll. If an employee received workmen's compen-
tion, he would be paid only the difference between
ch amounts and what he would otherwise receive
der the plan. As a condition to the receipt of bene-
s, the plan also required cooperation by the em-
oyee with his attending physician. Employees con-
buted nothing to the plan, which was voluntary
d not required by any state statute. The company
served the right to change the plan.

Epmeier, the employee, apparently received $300
onthly for six months under the plan. Such amount
ualed what his normal salary would have been
r the same period of time. Later he instituted suit
r refund of the federal income tax on this amount
the theory that the sickness benefits so received
ere excludible from gross income as "health insur-
ce" under Section 22(b)(5). Both parties agreed
at a requisite of health insurance was a contract
tween insurer and insured. In the District Court,[7]
e Government prevailed. Basing its decision on the

[7] *Epmeier v. United States* (N.D. Ind.), decided February 28, 52 (1952 C.C.H., par. 9261), reversed, 199 F. 2d 508 (C.A.).

plan's recurrent use of the term "free benefits," the provision that the employer could change the plan at will, and the absence of any contributions by employees, the District Court concluded that the benefits were not insurance because they were mere payments in the nature of compensation moving from employer to employee, and that they were, therefore, taxable. The District Court did not believe that Epmeier could legally enforce his claim to sickness benefits.

On appeal, the Seventh Circuit reversed the District Court and permitted the exclusion. Rationalizing that a formal contract is not necessary when the benefits plan can be viewed as part of the employment contract, the court adopted a novel approach and analyzed the sickness plan to ascertain similarities to orthodox accident or health insurance policies. Such allegedly shared characteristics so ascertained included the requirement of employee medical examinations; the basing of sickness benefits on salary and length of service; the provision for termination of benefits; the provision for successive illnesses; and the requirement that an employee cooperate with his attending physician. The plans' recurring use of the word "free" in describing the benefits was brushed aside as simply indicating that the benefits were furnished free of any money advancement. The employer's reserved right to alter the plan was discounted on the grounds that the employer could not make a change once liability had attached and, if any change did not suit him, an employee could quit. With respect to the interpretation to be accorded Section

(b)(5), the Seventh Circuit concluded (p. 511) at the legislative intent was "to relieve a taxapayer ho has the misfortune to become ill or injured, of e necessity of paying income tax upon insurance nefits received to combat the ravages of disease or cident."

We submit that the decision reached in the *Epmeier* se, *supra,* is both incorrect and based upon an erro- eous construction of the legislative intent underlying ection 22(b)(5) of the 1939 Code. See Point B, *pra,* wherein we demonstrate that under the 1939 ode Congress clearly did not provide for the exemp- on of sick leave payments such as are here before e Court. In addition, the original predecessor to ection 22(b)(5) was enacted because it was doubtful hether amounts received through *health insurance* ere required by statute to be included in gross ncome. H. Rep. No. 767, 65th Cong., 2d Sess. (1918), p. 29-30 (1939-1 Cum. Bull. (Part 2) 86, 92). In he income tax statutes before that time[8] income was efined to include "income derived from salaries, ages, or compensation for personal service of what- ver kind or in whatever form paid." There could ave been little doubt that amounts received by an mployee *as the continuation of his pay* during his bsence on account of sickness fell within the defini- on of taxable income. In fact, the reason for the oubt in 1918 as to the taxability of the proceeds of

[8]Section II B, Income Tax Act of 1913, c. 16, 38 Stat. 114, 67; Section 2(a), Revenue Act of 1916, c. 463, 39 Stat. 756, 57; Section 1200(a), Revenue Act of 1917, c. 63, 40 Stat. 300, 29; Section 213, Revenue Act of 1918, c. 18, 40 Stat. 1057, 1065.

health insurance was that it was thought that such proceeds were capital receipts. 31 Op. A.G. 304, 308. This reason could have had no application to *additional compensation* paid by an employer during a period of sickness, which was and is income, not capital. Thus payments such as those now before the Court clearly are *not* amounts received *through health insurance* within the intendment of Section 22(b)(5).

Moreover, a comparison of the factual circumstances of the instant case with those obtaining in *Epmeier, supra,* highlights the fallacy of the Seventh Circuit's attempt to arrive at a statutory interpretation based upon the additive similarities allegedly discernable between a system providing for sick leave and a commercial policy of health insurance. In a Civil Service setting, as contrasted to the sick benefits plan of a private employer, the characteristics fastened upon by the Seventh Circuit in *Epmeier* to classify payments as made through health insurance —*viz.,* that an employee (a) shall receive a physical examination, (b) shall, while on good behavior, continue to draw full salary during illness, for a limited time based on length of service, and (c) shall cooperate in such event with the attending physician—stand revealed as ambiguous criteria equally non-conclusive for purposes of classifying *either* regular salary *or* continued sick leave salary as amounts received through health insurance. In point of fact, both types of payment are included in the Civil Service compensation package and the civil servant's right to con-

ue to draw regular salary not yet earned is no
s nor no more enforceable than is his right to
w accumulated sick pay. Each is conditioned on
d behavior and on compliance with medical re-
rements, whatever the established standards may
As the District Court stated below (R. 17):

> * * * the problem is not whether the system setting up these payments is *like* health insurance. The problem is whether the payments are "amounts received through * * * health insurance" as those words are used in the Act. (Emphasis supplied.)

n any event, irrespective of whatever weight might
e be accorded the Seventh Circuit's decision in
meier v. United States, supra, the instant case is
arly distinguishable from *Epmeier* on its facts.
has been pointed out above, the Civil Service
ects of the SICK RULE here before the Court
sent a factual setting dissimilar to that arising
the case of a private plan adopted by a commercial
poration. Furthermore, in *Epmeier,* the court
pears to have relied upon the fact that the employ-
insurance company had statutory authority to in-
e health risks and in fact wrote disability insurance
part of its business. Finally, since the problem of
tutory construction is one requiring the application
relevant criteria to individual plans for purposes
determining whether *specific* amounts are received
rough * * * health insurance," each case must be
alyzed on the basis of its own facts.

As was here the case in the court below, the above-indicated approach was taken, we believe correctly, by the District Court in *Branham v. United States,* 136 F. Supp. 342 (W.D. Ky.), pending on taxpayer's appeal to the Sixth Circuit. There, the issue presented was whether an employee of the Standard Oil Company (Kentucky) could exclude an amount received, during illness in 1949, under the provisions of the company's employee and security program. The amount paid was equal to taxpayer's regular salary. The court relied on the following criteria, *inter alia,* in distinguishing the *Epmeier* case, *supra,* on its facts and in holding that the payments made were not excludible under Section 22(b)(5) as "amounts received through * * * health insurance": (1) The employees made no contribution; (2) the company had never maintained a fund from which disability benefit payments were made; (3) all such payments had been charged to operating expenses as payroll cost; (4) there had never been a trust or association which administered the plan; (5) no reserve had ever been set up on the company's books against which disability payments were to be charged; (6) the cost of disability benefit payments had never been determined in advance on an actuarial basis; (7) the company had never been licensed to act as a health insurer; and (8) the plan by its terms constituted a voluntary provision made by the company for the benefit and welfare of its eligible employees, with the result that it did not constitute a contract

nferring a right of action on participants therein. conclusion, the court stated (p. 345):

> In the case at bar, the written benefit plan states at the outset that it is a purely voluntary provision made by the Company for the benefit of its eligible employees and that it constitutes no contract and confers no right of action. Here, the employee pays nothing and the potential loss anticipated by the sickness of an employee is borne entirely by the Company and is in no wise diffused through the group of employees. There is no risk distribution and as quoted with approval in the case of *Commissioner of Internal Revenue v. Treganowan,* 2 Cir., 183 F. 2d 288, 291,
>
> " 'The process of risk distribution, therefore, is the very essence of insurance.' "

The administrative position.

As can be observed from the foregoing argument Point C, *supra*), only a relatively small number of ses involving the issue here on appeal have been esented to the courts under the Internal Revenue ode of 1939. The reason for this dearth of litigated ses probably lies in the fact that the federal tax nsequences of the great majority of the accident health insurance plans which are in operation roughout the United States have been made the bject of administrative rulings by the Internal evenue Service. Accordingly, it is believed that a ief statement of the administrative position taken the Commissioner with respect to comparable lans will be of interest.

The Internal Revenue Service's position taken with respect to health insurance under Section 22(b)(5) of the Internal Revenue Code of 1939[9] was developed between 1943 and 1952, the first keystone ruling being G.C.M. 23511, 1953 Cum. Bull. 86. There a company had established a plan under which it might, at its option, pay employees with a specified number of years of service a pension when they retired because of a non-occupational disability. The company would also pay employees with two years or more of service non-occupational disability benefits equal to full or one-half pay for a period of time based on length of service. The Internal Revenue Service ruled that neither benefit was excludible as accident or health insurance under Section 22(b)(5). The Service believed that Section 22(b)(5) did not exclude *all* disability payments, saying (pp. 87-88):

> It is the opinion of this office that Congress intended that only payments, not otherwise specifically excluded, which are truly "insurance" payments should be excluded from gross income under section 22(b)(5), *supra*. To hold otherwise would have the effect of excluding from gross income all payments which are made because of sickness or disability but which are conditioned upon employment and measured by the compensation being paid to the employee. Unless Congress intended that the payments must qualify as "insurance" before they are excluded, it would ap-

[9]The verbatim predecessor of Section 22(b)(5) was enacted in 1918. Section 213(b)(6), Revenue Act of 1918, c. 18, 40 Stat. 1057, 1066. However, Congress never attempted to enact any general definitions of accident or health insurance.

pear that the phrase "through accident or health insurance" would be meaningless and mere surplusage. The fact that the phrase was included indicates that section 22(b)(5), *supra,* is to have limited application.

n its ruling the Service established a contract as *sine qua non* of insurance. No contract was found the pension part of the plan there under considera-on. The payments were to be made at the company's iscretion, and the period during which the pension ould be paid was also optional with the employer. he temporary disability payments were not insur-nce for several reasons. The employees made no ontribution to the plan. Nor were the benefits paid om any fund independent of employer and employee. nd the benefits were measured by regular compensa-on. Furthermore, the benefits were recorded on the ompany's books as a charge to operating expenses.

Up until 1950, G.C.M. 23511, *supra,* represented ne Internal Revenue Service's position, the approach eing one to examine any given plan on its facts o ascertain whether it qualified as "insurance." In 950 and 1951, the Service issued rulings allowing xclusion with respect to three voluntary plans qual-fying under the provisions of the respective state ash benefit Acts of New Jersey, California and New ork. I.T. 4000, 1950-1 Cum. Bull. 21; I.T. 4015, 950-1 Cum. Bull. 23; and I.T. 4060, 1951-2 Cum. ull. 11. Then, in 1952, the Seventh Circuit came own with its unfavorable decision to the Govern-nent in *Epmeier v. United States, supra* (discussed

in Point C above), and the Internal Revenue Service was prompted to reevaluate its position.

Shortly after the *Epmeier* case was decided, the Service published I.T. 4107, 1952-2 Cum. Bull. 73, which dealt with a self-insured plan complying with the New York and New Jersey disability benefits statutes. The plan provided, after a three-day waiting period, for cash benefits equal to regular wages, to employees absent from work because of illness or accident. Though the wages covered both occupational and nonoccupational disability, they were reduced by the amount of any workmen's compensation. The employer retained the sole discretion to determine who should receive benefits, and he could revoke the plan at will within the time limits fixed by the applicable state disability benefits laws. The Service stated that compliance with state disability benefits statutes did not automatically transform a plan into insurance. Since I.T.'s 4000, 4015, and 4060, *supra,* had, in effect, held that such approval did automatically produce insurance, they were modified, effective January 1, 1953. The Service decided that each plan must in itself be insurance to qualify under Section 22(b)(5), thus signifying a return to the basic position earlier taken in 1943 in G.C.M. 23511, *supra.*

Inasmuch as I.T. 4107, *supra,* had been published shortly after the Seventh Circuit's decision in *Epmeier v. United States, supra,* the Service, on March 23, 1953, issued a press release (1953 C.C.H., par. 6136) announcing that the *Epmeier* decision would not be followed in other cases presented for rulings.

e Service stated its belief that the *Epmeier* case
l been decided on narrow grounds. It did not be-
ve that administrative action should extend the
lusion of Section 22(b)(5) to sick leave paid di-
tly by an employer to his employees. It did not
m proper to exclude sick leave based on regular
ges for some employees and to tax other employees
full on their wages. Therefore, the Service would
d such payments to be taxable.

That the settled administrative position developed
th respect to the here relevant Internal Revenue
de of 1939 is set out in G.C.M. 23511, *supra,* and
. 4107, *supra,* is borne out by two more recently
omulgated rulings, each involving a plan approved
der the New York Disability Benefits Law, and
th published simultaneously. The first, Rev. Rul.
3, 1953-2 Cum. Bull. 102, found insurance in the
se of a self-insured man calling for statutory ben-
ts and not a continuation of regular pay, where
e employees contributed to a separately trusteed
nd and the benefits paid were not made to depend
length of service. Under the plan, the employees'
ntributions at the date of the ruling had been suf-
ient to finance all past benefits paid. The second,
ev. Rul. 309, 1953-2 Cum. Bull. 104, reached the con-
ary conclusion. Here, with respect to three nonoccu-
tional disability benefit plans, where the employer
id the cost of all the benefits, the ruling cited I.T.
07 and G.C.M. 23511 in holding that the existence
a binding statutory obligation was not sufficient
make a plan one of insurance for purposes of

Section 22(b)(5). The criteria applied to determine that the plans did *not* constitute insurance were the following: (a) Employees did not contribute; (b) the benefits, especially in the first two plans, were based on regular pay and, with the exception of the third plan, their duration depended on length of service; (c) the employer did not establish any trust or independent entity into which it made contributions and from which the benefits were paid; and (d) there was nothing to distinguish the benefits from a continuation of regular pay during disability.

It is submitted that, under the criteria outlined above, the decision of the District Court below in the instant case squares with the administrative position adopted by the Internal Revenue Service in ruling on the tax consequences arising under the Internal Revenue Code of 1939 with respect to the payment of sick leave benefits.

In conclusion, it is well to remember that the taxpayer is claiming an exemption from taxation. The Government is not seeking to extend the income tax to payments not previously taxed. It is the taxpayer, rather, who is asking the Court to extend an exemption beyond the scope of its terms. It is fundamental that the taxpayer "must bring himself clearly within the excepted class by proofs which compel or persuade that he is excluded." *Frederick Smith Enter. Co. v. Commissioner,* 167 F. 2d 356, 359 (C.A. 6th); *Bowers v. Lawyers Mortgage Co.,* 285 U.S. 182, 187.

statutory exemption is to be strictly construed. *vering v. Northwest Steel Mills,* 311 U.S. 46, 49. vell-founded doubt as to the meaning of an ex- tion is fatal to a claim of exemption from taxa- . *Bank of Commerce v. Tennessee,* 161 U.S. 134,

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CONCLUSION.

or all the reasons set forth above, we submit that decision of the District Court below was correct should here be affirmed.

arch, 1956.

Respectfully submitted,

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No. 14,912

IN THE

United States Court of Appeals

For the Ninth Circuit

ANNE G. MOHOLY, as Administratrix of the Estate of Philip F. Moholy, Deceased, and ANNE MOHOLY,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

On Appeal from the Judgment of the United States District Court for the Northern District of California.

APPELLANTS' REPLY BRIEF.

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No. 14,912

IN THE

United States Court of Appeals

For the Ninth Circuit

ANNE G. MOHOLY, as Administratrix of the Estate of Philip F. Moholy, Deceased, and ANNE MOHOLY,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

On Appeal from the Judgment of the United States District Court for the Northern District of California.

APPELLANTS' REPLY BRIEF.

PRELIMINARY STATEMENT.

The brief for the appellee was received March 16, 1956. By order of this court appellants were given until May 4, 1956, to file a reply to the appellee's brief. The argument contained in the brief for the appellee is divided into four sections that are respectively designated as A, B, C and D. For convenience and clarity the appellants' reply will follow the same designations.

REPLY TO APPELLEE'S ARGUMENT.

A. APPELLEE'S ASSERTION THAT "THE SICK LEAVE PAYMENTS HEREIN MADE DO NOT PARTAKE OF THE NATURE OF 'AMOUNTS RECEIVED THROUGH HEALTH INSURANCE'" IS NOT BORNE OUT BY THE ARGUMENTS ADVANCED IN SUPPORT THEREOF.

Appellee's first argument is stated as follows:

"As a practical matter of common every-day speech, continuation of an employee's salary by his employer during absence on account of sickness is not known as health insurance. Just like the continuation of salary during vacations it is part of the compensation paid for past and prospective services." It is respectfully submitted that the first of these statements is irrelevant and the second is demonstrably untrue. Stating that sick leave pay is not known as health insurance is simply raising a straw man to be demolished. We have never contended that the two terms are synonymous or co-extensive. It is obvious that *all* health insurance is not sick leave with full pay, and it is equally obvious that *all* sick leave with full pay is not health insurance. The appellee and the court below imply that because all sick leave with full pay is not health insurance, no sick leave with full pay can be health insurance. When this deduction is stated rather than implied, the fallacy becomes so obvious that we think it unnecessary to labor the point. Appellants concede that under various circumstances and arrangements sick leave pay would not constitute amounts received through health insurance. On the other hand, if an employee or a group of employees received compensation while sick, under a set of facts

ich include all of the requisites of health insur-
ce, such amounts do not lose their character as
ounts received through health insurance simply
ause they are *called* sick leave with full pay.
here, as in this case, an employer for a valuable
sideration agrees to assume the risk of loss by en-
ing into a legally enforceable undertaking to pay
employee compensation for sickness, all of the
quisites for health insurance have been met.

Appellee's second statement that "just like the
ntinuation of salary during vacations, it is part of
compensation paid for past and prospective serv-
s" is just not true in the instant case. The pre-
e point has been adjudicated by the California
urts. *Adams v. City and County of San Francisco*
949), 94 C.A.2d 586 (rehearing by the Supreme
urt of California denied). This case, although
ed in the appellants' opening brief, is not adverted
in the brief for the appellee. It is unnecessary to
nsider general statements gleaned by the appellee
om a New Jersey decision involving entirely dif-
ent considerations when the precise section of the
arter of the City and County of San Francisco
der which the payments herein concerned were
ade has been adjudicated by the California court
ving jurisdiction to make such adjudications.

Sections 140 through 157 of the Charter of the City
d County of San Francisco set up a comprehensive
vil Service system. With exceptions not relevant
re schedules of compensation are proposed by the
vil Service Commission and enacted into law by

the Board of Supervisors. Section 151 of the Charter states that all Civil Service employees shall receive two weeks' vacation with pay. Subsequently, Section 151.3 was adopted which provides that the rate of pay of municipal employees engaged in certain crafts shall be the same as the rate of pay fixed by collective bargaining by such crafts in private industry. In the *Adams case* a collective bargaining agreement provided for only five working days' paid vacation, and no sick leave pay at all. The court held that *vacation pay* is part of the employee's *compensation* and is governed by the collective bargaining agreement which was adopted pursuant to Section 151.3. Therefore, the employees were entitled to only five days' vacation pay since, by its subsequent enactment, 151.3 must be considered to have superseded Section 151 for these particular crafts.

On the other hand, the court held that sick leave pay is *not* part of the *wages* or *compensation* of the employee and therefore is not affected by the provisions of Section 151.3. Compensation while disabled or sick is provided for by Section 153 of the Charter. (Appellants' Opening Brief, App. p. i.) The court said that holiday pay, overtime pay, and vacation pay, all have some remote relation to working conditions and must be held to relate to compensation, but compensation for sickness or disability, under Section 153, is not a part of the employee's wages or compensation. The court said that it was somewhat comparable to medical benefits. "Payment for sick leave is a benefit given as an allowance payment on

a humanitarian basis in the interests of the employee's welfare." "Sick leave or disability leave pay is not a gratuity. There is no vested right to such compensation until the happening of the contingency, namely disability or sickness as defined in Civil Service Rule 32. (Appellants' Opening Brief, App. p. ii.) A rehearing by the Supreme Court of California was denied and the case remains the settled law of the State of California. We believe that the appellee will concede (certainly the Commissioner of Internal Revenue has conceded by the rulings referred to in Section D of Appellee's brief) that if the City and County of San Francisco had reinsured its liability assumed under Charter Section 153 with some private commercial insurance company, the amount paid to Captain Moholy would have been amounts received through health insurance. It is unrealistic to say that these payments do not partake of the nature of insurance because the City elected to carry the risk itself.

Appellee's next argument is that the plan under which Captain Moholy received the payments in question lacks the fundamental characteristics of health insurance. Appellants' opening brief sets forth the various features of the plan under which Captain Moholy received compensation for sickness. We argued (page 6) "Any enforceable obligation whether evidenced by a policy, a contract, or a charter provision, or regulation adopted pursuant thereto, whereby one undertakes to indemnify another against loss arising from a contingent or unknown event constitutes insurance."

Appellee does not deny that these features exist in the plan adopted by the City and County of San Francisco, but argues that they are negatived by the absence of a "fundamental and practical feature of health insurance". This "fundamental and practical feature of health insurance" is stated to be a custom or practice on the part of insurance carriers not to pay more than 75% to 80% of the insured's regular compensation. Of course, there is *nothing in the record* before this Court to substantiate this statement, and it is hardly a matter concerning which the court can or should take judicial notice. The rule quoted is apparently an underwriting rule claimed by one, Mr. Faulkner, to exist during and prior to 1940. It is perhaps superfluous to point out that Mr. Faulkner's qualifications are unknown and that he was not in court under oath or subject to cross-examination.

Whatever underwriting rules may have existed at the time Mr. Faulkner wrote his book, have no application to the issuance of health insurance in California. Section 10369.7 of the Insurance Code of the State of California permits the insurer to include at its option in policies of health insurance a limitation that the total monthly benefits for the same loss of time covered by all outstanding policies of health insurance shall not exceed the beneficiary's average monthly salary or average for the period of two years immediately preceding, whichever is greater, providing that this shall not reduce the monthly benefits to less than $200 per month. Thus, an insurer who elects to use this optional clause cannot reduce benefits be-

ow $200 per month even if the insured's salary is nly $100 per month. There is nothing in the rec- rd before this court, or before the lower court, upon vhich a finding could have been made that individual r group health insurance is not written in Cali- ornia for an amount equal to or in excess of the in- ured's earnings. Even if the alleged rule had been roved to exist it could not operate to prevent any nsurer in California from writing policies in ac- ordance with State Law.

Appellee's next argument is "the sick rule here efore the Court, unlike health insurance, is expressly dministered as an integral feature of a department's *ompensation* plan for its members". We believe that his contention is completely disposed of by the de- ision in *Adams v. City and County of San Fran- isco,* discussed supra. In that decision, the court learly brings out the fact that while benefits paid nder Charter Section 153 are a feature of a depart- ment's personnel policy they are not a part of its ompensation plan. Certainly the City would be en- itled, as an integral feature of its personnel policy, o purchase and maintain a commercial health in- surance policy for the benefit of its employees. The act that it elected to carry its own liability and save he excess premiums that would be required does not hange the nature of the benefits received by the em- ployee. Nearly all of the arguments raised in appel- lee's brief boil down to the fact that the City elected to carry its own risks and not reinsure with a com- mercial health insurance company.

Appellee attempts to point out certain dissimilarites between the sick rule of the San Francisco Fire Department and health insurance. Since appellee studiously refrains from alleging that these things are essential requisites of health insurance, the alleged omissions would seem to be immaterial. The statement that the fireman has no direct right to sue for claimed benefits is clearly erroneous. The right to sue for benefits on a commercial policy of health insurance is not conferred by the policy of insurance, but by the law which permits an action to be brought for breach of contract. Insurers are permitted to establish certain conditions which must be met before suit can be brought on the policy. Similarly, a fireman must exhaust administrative remedies before he can bring an action on his claim. *Adams v. City and County of San Francisco,* supra. Appellee next states "no premiums are charged". There is no requirement in the taxing statute that premiums must be charged. The Bureau of Internal Revenue has never denied the propriety of the employer furnishing health insurance at his own expense. The same answer is applicable to appellee's statement that no trusteed fund is provided for. We know of no judicial definition of health insurance that includes the use of a trusteed fund. No authority to that effect is cited and we believe that there is none.

Appellee next states, "obviously the San Francisco Fire Department does not write insurance as part of its public function; neither is it licensed as a health insurer". If this statement seems obvious to

appellee it can only be so because of appellee's unfamiliarity with the laws of the State of California. The City and County of San Francisco, a governmental subdivision of the State of California, both can and does engage in insurance activities as part of its public functions. For example, Section 172.1 of the Charter of the City and County of San Francisco sets up a health service system for the purpose of procuring or providing medical care for the employees covered by such system. Subdivision 3 of Section 172.1 gives the health service board the power to either adopt a plan for rendering medical care to members of the system, or for the indemnification of the cost of said care, or for obtaining and carrying insurance against such cost.

The Supreme Court of California held that the establishment of a health system for City employees is a municipal affair, and that Section 172.1 of the Charter was constitutional and a valid exercise of the municipality's governmental powers. *Butterworth v. Boyd* (1938), 12 C.2d 140, 82 P.2d 434, 126 ALR 838. The court directly passed upon the point advanced by appellee that the City is not licensed as an insurer. In this connection the Court said: "It is suggested that the Charter provision is in conflict with the State Insurance Code in that it authorizes what is, in effect, an insurance business without a certificate of authority from the Insurance Commissioner. . . ." "A still more obvious answer to counsel's suggestion is that the Insurance Code deals with the private business of insurance and neither ex-

pressly nor impliedly purports to regulate governmental activities of municipalities. It is, of course, a well-settled doctrine that general words in a statute which might have the effect of restricting governmental powers are to be construed as not applying to the State or its subdivisions." The reasoning of the court is just as applicable to benefits paid under Section 153 as to benefits paid under Section 172.1.

Another type of insurance carried by the municipality of San Francisco is Workmen's Compensation Insurance. Section 3300 of the Labor Code of the State of California classifies cities and counties as among the employers covered by the State Workmen's Compensation laws. Under Section 3700 of the Labor Code every employer, except the State and its political subdivisions, are compelled to carry insurance against liability or secure a certificate and consent from the Director of Industrial Relations to self-insure. Thus, while a city has the same liability as any other employer, under Section 3300 it is permitted by Section 3700 to make its own arrangements to take care of this liability. Section 172 of the City Charter reads in part as follows:

> "The benefit provisions of the Workmen's Compensation insurance and safety law of the State of California as they affect the benefits provided for or payable to or on account of officers and employees, including teachers of the City and County, shall be administered exclusively by the Retirement Board, provided that the Retirement Board shall determine whether the City and County through the Retirement System shall

assume the risk under the said law in whole or in part, or whether it shall re-insure such risks, in whole or in part, with the State Compensation Insurance Fund. Benefits under such risks as may be assumed by the City and County and premiums under such risks as may be re-insured shall be paid by the Retirement System, and in amount equal to the total of such benefits and premiums as determined by the actuary for any fiscal year, including the deficit brought forward from previous years, shall be paid during such fiscal year to the Retirement System by the City and County."

The government conceded, and the court below found, that amounts paid to Captain Moholy under the above Charter provision constituted payments received from workmen's compensation. That issue is not before this court, but it illustrates the point that the City and County of San Francisco, as a subdivision of the State of California, can write insurance as part of its public function and does not require a license therefor from the State Insurance Commissioner.

Appellee's final argument under Division A of its brief is based upon an allegation that there is no distribution of risk under the plan here involved. If the plan were not in existence each fireman would lose his compensation whenever he was sick from a cause not covered by state compensation laws. The risk of loss of wages from sickness is shifted from the individual fireman to the City and County of San Francisco to the extent that the City has assumed the

risk under the statutory plan. As far as the distribution of risk is concerned the City and County of San Francisco is in no different position than any other insurer. The City and County of San Francisco, like any other insurer, must assume that all of the beneficiaries will not become ill at the same time, but that the incidence of illness will follow a more or less established statistical pattern. To quote the appellee's brief, page 12, "By diffusing the risks through a mass of separate risk-shifting contracts the insurer casts his lot with the law of averages." Probably the City has more beneficiaries and therefore a wider diffusion of risk than many health insurance companies. Appellee has confused the risk of loss with the actual payment of the claims. Whether the insurer is a commercial health insurance company or the City and County of San Francisco, the incidence of loss is shifted from the beneficiaries to the insurer and the risk is distributed over the entire number of beneficiaries who have coverage under the arrangement. The commercial insurance company would necessarily pay claims from premiums collected. If it chose to do so, San Francisco could have re-insured its claim and paid premiums to a commercial health insurance company. Precisely because there is a wide diffusion, or distribution of risk, the City and County of San Francisco finds it less costly to pay the claims directly than it would be to pay them in the form of premiums to an insurance company which must not only collect a premium large enough to cover all potential claims, but also additional amounts for reserves, taxes, overhead and dividends.

Suppose a commercial insurance company wrote a policy covering all of the employees of the City and County of San Francisco and had no other policy holders. And suppose the entire premium for the policy were paid by the City and County of San Francisco. Would appellee seriously argue that benefits paid to an employee by the insurance company were not "amounts received through health insurance"? We know of no instance where the Commissioner of Internal Revenue has claimed that benefits from a commercial health insurance company lost their character as amounts received through health insurance because the premium on the policy was entirely paid by the employer.

Appellee cites *California Physicians Service v. Garrison,* 28 C.2d 790, 172 P.2d 4, in support of its position. This case is not in point because there was no contractual obligation on the part of the California Physicians Service to defray medical expenses incurred by the organization's dues-paying members. The Supreme Court held that the California Physicians Service merely acted as an agent for the collection and distribution of funds. Medical services to the dues-paying members was offered by the professional members of the organization. The corporation, i.e., the California Physicians Service, did not agree to pay the medical expenses. It merely agreed to collect the dues and prorate them among the doctors who were members of the organization. The Court pointed out that the compensation of the doctors could be high or low, depending upon the incidence of sickness and the

number of beneficiary members paying dues. All risk is assumed by the physicians, not the corporation. The court pointed out that under the whole plan of operation, the corporation was rendering a service and its function was not one of indemnity. The Chief Justice concurred in the decision solely on the ground that the legislature by the enactment of Civil Code Section 593a exempted such organizations, as California Physicians Service, from regulations by the Insurance Commissioner, substituting instead supervision by a professional board and the State Attorney General. In any event, it is clear that this case has no bearing upon a situation where the employer has a legal obligation to pay all claims in accordance with the plan. The decision of the same court in *Butterworth v. Boyd,* supra, is more to the point.

B. IN THIS SUBDIVISION APPELLEE ARGUES THAT UNDER THE INTERNAL REVENUE CODE OF 1939, CONGRESS DID NOT INTEND TO EXEMPT THE KIND OF PAYMENTS HERE INVOLVED.

First, appellee argues that if Congress had intended to exempt from taxation payments such as those made by the City and County of San Francisco, it could readily have done so by deleting the phrase "through accident or health insurance or under Workmen's Compensation Acts". Appellee then says that the section would have read as the taxpayer, in effect, urges this court to read it, so as to exempt "amounts received as compensation for personal injuries or

ckness". This, most emphatically, is not what the ppellant is urging the court to do. We have repeatdly, in this and in our opening brief, disclaimed any uch contention. We do not say that *all* payments rom employers to employees, as compensation for ckness, constitute health insurance. On the other and, we do say that if benefits are paid under a plan aving all of the requisites of health insurance, the xemption should not be restricted to commercial ealth insurance companies.

Second, appellee argues that if our interpretation f Section 22(b)(5) is correct, Congress would not ave needed to have amended Section 22(b)(5) in 942. Appellee's reasoning is obscure, but it does efer to the amendment of Section 22(b)(5) as exending the exemption to a limited and specified cateory of paid sick leave. Just what a limited and specied category of paid sick leave has to do with the mendment in question is not apparent. The Amendnent refers to, "amounts received as a pension, anuity, or similar allowance for personal injuries or ickness resulting fom active service in the Armed Forces of any country". "Similar allowance" apparntly means similar to a pension or annuity. Appellee s again attempting to force appellants into a posiion which we have constantly disclaimed. We reitrate that it is not our position that *all* sick leave payments constitute amounts received through health nsurance. To constitute insurance there must be an nforceable obligation whereby one undertakes to ndemnify another against loss arising from a con-

tingent or unknown event. These requisites are all present in our case. We do not know, and the Congress in 1942 could not know, whether those requisites would be present in all instances where amounts were received as a pension, annuity, or similar allowance from *any country.*

Appellee's third argument is based upon a supposed analogy between Section 22(b)(1) and Section 22(b)(5). The House-Senate conference report on the Revenue Act of 1951 contains the following comment upon the amendment referred to in appellee's brief:

> "This amendment amends Section 22(b)(1) of the Code (relating to exclusion of life insurance proceeds from gross income) to provide for a limited exclusion for amounts paid by an employer to the beneficiaries of an employee by reason of the employee's death." Congressional Report U.S. Code Congressional Service, Vol. II, p. 2125.

The $5,000 limitation may have been a primary purpose of the amendment. The courts otherwise *might* have held that a contract of an employer providing for the payment of such amounts to the beneficiaries of an employee by reason of the death of the employee *were* life insurance, in which case the beneficiaries would have had the exemption without the $5,000 limitation. The amendment could hardly be called an empty gesture if its only result were to eliminate the type of litigation which has resulted from the Treasury's interpretation of Section 22(b)(5).

One might ask why Congress did not clarify ection 22(b)(5) at the same time it adopted the larifying amendment to Section 22(b)(1). The an- wer seems to be that at the time the Revenue Act f 1951 was before the Congress the Commissioner f Internal Revenue had adopted a fairly reasonable nterpretation of Section 22(b)(5). (See the brief or the appellee, pp. 26-27.) At the time the Revenue ct of 1951 was before Congress, the Bureau of nternal Revenue had ruled that disability benefits eceived by employees under the New Jersey Tempo- ary Disability Benefits Law and the California Un- mployment Insurance Act were not taxable income. he Treasury had ruled that such payments were xempt as a payment under a form of health and acci- ent insurance. IT 4000, CB 1950-1, 21. The Treasury lso ruled that New York disability payments were milarly exempt, whether made by the State Insur- nce Fund, by an insurance company, or under a self- nsured plan. IT 4060, CB 1951-2, 11. There is no ubstantial difference between the benefits paid under he California Unemployment Insurance Act and hose paid under Section 153 of the Charter of the ity and County of San Francisco. However, after he Treasury completely reversed its position, or re-evaluated'' its position (appellee's brief, p. 28), ongress was constrained to intervene. This it did by ompletely rewriting the law in the Internal Revenue ode of 1954, so as to exempt from taxation prac- ically all of the payments which the Commissioner as attempting to tax.

To summarize, it appears that Congress did not amend Section 22(b)(5) at the same time it amended Section 22(b)(1) because at that time the Commissioner's interpretation of Section 22(b)(5) was in accord with the Congressional intent, but when the Commissioner reversed his rulings and attempted to tax that which Congress had intended to be exempt, Congress restored the exemption by enacting Section 105(d) of the Internal Revenue Act of 1954.

C. THE DECIDED CASES.

Under this heading appellee discusses one of the three cases cited by appellant in support of this appeal. Appellee attacks the Seventh Circuit's decision in *Epmeier v. United States,* 199 F.2d 508, on several grounds. First, appellee attacks the decision on the grounds set forth in subdivisions A and B of its brief and which we have heretofore answered. Second, irrespective of whatever weight might here be accorded the Seventh Circuit's decision in *Epmeier v. United States,* appellee claims that the instant case is clearly distinguishable from *Epmeier* on its facts. For some unexplained reason, appellee seems to feel that the fact that San Francisco firemen are civil service employees makes their sick-pay benefits a portion of their compensation. We believe that this contention is decisively disposed of in *Adams v. City and County of San Francisco,* supra. Appellee further states that "the Court appears to have relied upon the

ıct that the employer insurance company had stat-
ory authority to insure health risks and, in fact,
rote disability insurance as part of its business".
his statement was first made in a publicity release
the Commissioner of Internal Revenue after the
pmeier decision. It has been regularly restated in
l of the briefs prepared by the government on all
the cases which have arisen on the point. Appar-
ıtly, this constant reiteration as a fact of something
hich was not adverted to in the *Epmeier* decision
ıs had some effect, since it appears in the opinion
the court below. As we state in our opening brief
ıere is not a word in the *Epmeier* opinion which in-
cates that the decision was affected in any way by
ıe fact that the employer was an insurance company.

Appellee did not discuss *Herbkersman v. United tates,* 133 F.Supp. 495, now pending on appeal to ıe Sixth Circuit, or *Haynes v. United States,* 1955 CH Par. 9231, now pending on appeal to the Fifth ircuit, apparently for the reason that these cases ere decided on the authority of *Epmeier v. United tates,* supra. Appellee does rely, however, on *Bran-ım v. United States,* 136 F.Supp. 342, now pending ı appeal to the Sixth Circuit, which distinguished ıe *Epmeier* case. This case can be distinguished rom the instant case because the court found that ıe plan was purely voluntary, constituted no con-ract, and conferred no right of action. In our case ıe appellants' rights arise under Section 153 of the harter and are enforceable at law. *Adams v. City nd County of San Francisco,* supra.

For the sake of completeness, one other case should be mentioned here which was decided after appellee's brief was filed. On March 22, the Tax Court of the United States decided the case of *Joseph Oliva,* 25 TC No. 153. This case involved disability benefits paid to an employee of the Standard Oil Company in the state of Pennsylvania. A majority of the court decided adversely to the taxpayer on the authority of *Branham v. United States,* supra, and the decision in this case in the court below. In our opinion, the dissenting opinion correctly sets forth the law in the following language:

> "Although the broad issue before us in this case is whether the benefits received under the Esso sickness benefit plan are excludible from gross income of the taxpayer under section 22(b)(5) of the Internal Revenue Code of 1939, there are involved in that question two separate subissues; first, is the benefit plan a contract of health insurance and, second, if so, is the term 'health insurance' as employed in that section broad enough to include employer-purchased or financed health insurance. Put another way, the second subissue may be stated as, whether the term 'health insurance' may be limited in its meaning to only the ordinary commercial type of health insurance which is evidenced by a formal policy purchased from one generally engaged in the business of selling such insurance to the public.
>
> Congress has clearly expressed the intention that 'amounts received through * * * health insurance * * * as compensation for * * * sickness' are to be excluded from gross income. The majority holding is to the effect that this clear lan-

guage means that only such amounts as are received through insurance expressed in formal health insurance policies purchased from commercial purveyors of such policies are to be so excluded. In my view such a judicial amendment to the law cannot be justified. While it is true that courts may add words to a statute or disregard words which are employed, this is true only where to do otherwise would do violence to an evident legislative scheme or plan. No such underlying plan is apparent here nor is one pointed to or relied upon by the majority.

In my opinion the sickness benefit plan here in controversy is a contract of health insurance under the reasoning of Epmeier v. United States, 199 F.2d 508 [42 AFTR 716], and the benefits received thereunder are excludible from the gross income of the petitioner under section 22(b)(5)."

D. THE ADMINISTRATIVE POSITION.

The subsection of appellee's argument, entitled "D" an historical statement of the Commissioner's anging position on the issue here involved. About e only thing that we can derive from this history the fact that the Commissioner, like the courts, s had a great deal of difficulty in making up his ind on the issue. Until some time in 1952 the administrative position was substantially in accordance ith the contentions of the appellants herein. Effeve January 1, 1953, the Commissioner reversed himlf and decided that health insurance, as used in ection 22(b)(5), is limited in its meaning to the

ordinary commercial type of health insurance which is evidenced by a formal policy purchased from one generally engaged in the business of selling such insurance to the public. The fact that until 1952 the Commissioner generally adopted a position in favor of the exemption probably accounts for the dearth of decided cases until quite recently. Now with cases pending in the Fifth and Sixth Circuits, as well as the instant case before this Court, the Commissioner, in all probability will soon learn whether he was right prior to 1952 and wrong thereafter, or vice versa.

CONCLUSION.

For the reasons set forth herein and in our opening brief, we submit that the decision of the District Court below should be reversed and remanded to the District Court with directions that the District Court enter judgment for appellants and against the defendant, in accordance with the prayer of the complaint.

Dated, San Francisco, California,
May 2, 1956.

CLYDE C. SHERWOOD,
Attorney for Appellants.

JOHN V. LEWIS,
Of Counsel.

No. 14,915

IN THE

United States Court of Appeals

For the Ninth Circuit

FLORENCE ALICE PAQUET,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

BRIEF FOR APPELLANT.

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PERNAU-WALSH PRINTING CO., SAN FRANCISCO, CALIFORNIA

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IN THE

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For the Ninth Circuit

'LORENCE ALICE PAQUET,
Appellant,

vs.

JNITED STATES OF AMERICA,
Appellee.

BRIEF FOR APPELLANT.

STATEMENT RE JURISDICTION.

Appellant was duly indicted (R. pp. 3 and 4) and ied in the District Court for the District of Hawaii ı the charges of violating sections 1542 and 911 as ıe same are to be found in Title 18 of the United tates Code.

After trial by jury which resulted in a verdict of ıilty (R. pp. 7 and 8), she perfected her appeal this Court in conformity with the provisions of 3 USC Section 1291 (R. pp. 10-12).

STATEMENT OF THE CASE.

To support the allegations of the indictment, amely: that on or about August 16, 1954, and again

on or about March 30, 1955, appellant made false statements as to her place of birth and falsely represented herself to be a citizen of the United States (R. pp. 3 and 4), there were offered, and received, in evidence the following exhibits:

Exhibit No. 1: Certificate of nonexistence of citizenship record.

Exhibit No. 2: Purporting to be a photostat copy of application for passport dated August 17, 1954.

Exhibit No. 3: Application for passport dated August 17, 1954.

Exhibit No. 4: United States passport.

Exhibit No. 5: Canadian passport.

Exhibit No. 6: Statement of Florence Alice Paquet (appellant).

Objection was made and overruled as each of the foregoing exhibits was offered in evidence. Later the appellant moved to strike them (R. pp. 123-127). The motions were denied in each instance.

The admission of these exhibits was included in the several grounds for a judgment of acquittal (R. p. 127). The court reserved its ruling on this motion. Following the jury's verdict of guilty, the court denied appellant's motion for a judgment of acquittal (R. p. 147).

In addition to the claimed inadmissibility of Exhibits Nos. 1 to 6, inclusive, the motion for a judgment of acquittal raised the following questions, namely:

(a) Failure of the evidence to sustain all the aterial allegations of the indictment.

(b) Inadmissibility of the evidence, both written d documentary, of admissions and confessions of pellant.

The only additional question involved arises out the court's refusal to instruct the jury to the effect at Hawaii, Guam and Wake are parts of the United ates, and that a passport is not required for travel and from them. Such an instruction was sought appellant in "Defendant's Requested Instruction o. 18" and refused (R. p. 7).

SPECIFICATION OF ERRORS RELIED UPON.

1. The admission in evidence of Exhibits Nos. 1 5, inclusive, and of each of them, was erroneous.

2. The admission in evidence of testimony as to al admissions and confessions and of the written atement of appellant (Exhibit No. 6) was erroneous.

3. The refusal of defendant's requested instruction o. 18 was erroneous.

4. The overruling of the motion for a judgment acquittal was erroneous.

SUMMARY OF ARGUMENT.

I.

The admission in evidence of Exhibits 1 to 5 inclusive, and each of them, was erroneous.

No conviction under Counts I and II of the indictment could be had without legal proof that appellant was not born at Barre, Vermont.

No conviction under Counts III and IV could be had without legal proof that she was not a United States citizen either by birth or naturalization.

Since Exhibits 1 to 5, inclusive, were erroneously received in evidence, the conviction cannot be upheld.

II.

In the absence of proof of the *corpus delicti* and corroboration, statements in the nature of admissions and confessions cannot be lawfully used to procure a conviction.

III.

Since it was necessary to a conviction that the jury find beyond all reasonable doubt that the so-called "passport" was in fact and in law a passport, defendant was entitled to have the jury instructed that passports are not required for other than foreign travel.

IV.

Because of the errors complained of, the appellant was entitled to a judgment of acquittal.

SPECIFICATION NO. 1.

HE ADMISSION IN EVIDENCE OF EXHIBITS NOS. 1 TO 5 INCLUSIVE, AND OF EACH OF THEM, WAS ERRONEOUS.

Exhibit No. 1 was offered to show the nonexistence a record of defendant's naturalization as an Amerian citizen.

> A written statement signed by an officer having the custody of an official record or by his deputy *that after diligent search* (emphasis added) no record or entry of a specified tenor is found to exist in the records of his office accompanied by *a certificate as above provided* (emphasis added) is admissible as evidence that the records of his office contain no such record or entry.
>
> Rules of Federal Procedure, Rule 44b.

What the certificate is which is referred to in Rule 4b as set forth next above is designated in the openg sentence of Rule 44a, which reads, "An official ecord or an entry therein when admissible for any urpose, may be evidenced by an official publication ereof or by a copy attested by the officer having e legal custody of the record or by his deputy and *ccompanied with a certificate that such officer has e custody.*" (Emphasis added.)

Further provision of Rule 44a is that the certificate ay be made in one of two ways: (1), "by a judge a court of record of the district or political subivision in which the record is kept authenticated by e seal of the court," or (2), "by any public officer aving a seal of office and having official duties in e district or political subdivision in which the ecord is kept, authenticated by the seal of his office."

The statement which is part of Exhibit 1 purports to be signed by one H. L. Hardin who describes himself as "Chief, Records Administration and Information Service."

It is accompanied by a "certification" purporting to be signed by one E. A. Loughran who describes himself as "Assistant Commissioner, Administrative Division, Immigration and Naturalization Service."

Neither of these signatures was proved at the trial. The only seal appearing on any of the papers comprising Exhibit 1, is one which reads "Department of Justice, Immigration and Naturalization Service."

The "certification" does not certify that the person purporting to make the certificate of nonexistence of record (Hardin) had custody of the records among which the record sought would normally be found. Such a statement is specifically required by Rule 44a to be included in the so-called "certification."

The statement of Hardin which he denominates, "Certificate of Non-Existence of Citizenship Record", falls short of the prime requisite that it was made "after *diligent* (emphasis added) search." (Rule 44b.) Indeed, it does not appear that any search, diligent or otherwise, was made.

As to Exhibits 2 and 3. These were not accompanied with a certificate that "the officer from whose custody they purport to come, has the custody thereof." That such a certificate is necessary for their admission in evidence is clear from the unequivocal language of Rule 44a, particularly the last phrase of the first sen-

ıce, namely, "and accompanied with a certificate ıt such officer has the custody."

Exhibits 4 and 5 are respectively American and nadian passports. They were taken from the de- ıdant while she was unlawfully in custody under cumstances which were in violation of her rights der the Constitution to be secure in the possession her papers and against self crimination.

Upon arriving at Honolulu from Guam by air, de- ıdant was accosted by custom inspector James ɛane and detained in a room at the Honolulu Air- rt (R. pp. 65-66).*

She was later permitted to go to her home at 288-A ai Mani Way in Honolulu and shortly thereafter

---

*R. p. 65:

Q. (By Mr. Dwight). Where did you see the defendant on March 30, 1955? Where did you see her?

A. Honolulu Airport.

Q. And how did it happen that you saw her? What caused you to see her?

A. She arrived on a Pan-American plane and I happened to be inspecting the arrival of the passengers that morning, and she was one of them.

Q. Now, Mr. Keane, how is it that you recall her? There were a lot of people on the plane.

A. I recall her because of the fact that I had a radiogram concerning——

Mr. Soares. We object to any hearsay.

A. (Continuing). I recall her because of the fact that she was one of the first several that came in and upon the presentation of a U. S. passport I put it in my pocket and asked her to wait until I called for her later and sent her back out in the waiting room and did not inspect or talk to her until the last person had been taken care of, had been inspected.

Q. Now, did you have any conversation with the defendant?

A. I did.

Q. And what were those conversations about?

A. The conversation was concerning the passport and why she had left Guam.

George Elms, an investigator with the Department of Justice, Bureau of Immigration and Naturalization put in his appearance. Under pressure (the witness himself described it so, using the language "pressed the issue." R. p. 89), he obtained the two passports, Exhibits 4 and 5. Thereafter he took her down to the Immigration station where he procured a statement which later, over objection by defendant, was admitted in evidence as Exhibit No. 6.

Having secured the passports, Exhibits Nos. 4 and 5, and the confession, Exhibit No. 6, under the circumstances outlined above, a charge involving matters and things therein referred to was lodged against this defendant. The specific charge was falsely claiming United States citizenship when making an entry into the United States at Honolulu. When the defendant presented herself for sentence, having some days previously plead guilty, without benefit of counsel, the Chief Judge of the United States District Court of Hawaii, discharged the defendant (See *United States v. Paquet,* 131 F. Supp. 32). It was only after that action that the instant case was instituted and prosecuted.

SPECIFICATION NO. 2.

E ADMISSION IN EVIDENCE OF TESTIMONY AS TO ORAL ADMISSIONS AND CONFESSIONS AND OF THE WRITTEN STATEMENT OF APPELLANT (Exhibit No. 6) WAS ERRONEOUS.

To the receiving in evidence of the admissions and nfessions defendant objected on the ground that same were made under duress, the appellant be- in custody and restrained of her liberty without e process of law; that there had not been any proof the *corpus delicti;* and that there was no corroboran of statements made by the defendant.

The written admissions and confessions are Exbit 6 (R. pp. 111-120).

The oral testimony referred to is included in the dence of James Keane (R. pp. 64-74) and of orge Elms (R. pp. 82-95).

Keane said in effect that at the Honolulu Airport, on presentation (inferentially to him by the deidant) of a United States passport he put it in his cket and required her to remain in a room until had "taken care of", that is, "inspected" the last rson on the arriving airplane whereupon, in reonse to questions asked by him (he at the time wear- his badge of office where it could be seen), she d him that the passport he had in possession was rs and that she was born in Barre, Vermont.

Elms testified in effect that he, an investigator with e Department of Justice, Bureau of Immigration d Naturalization at Honolulu (R. p. 74) identified mself as such investigator and, in answer to quesns put by him, appellant turned over to him her

United States passport and said she was born in Canada and was a citizen thereof; that she had arrived at Honolulu that morning with a United States passport which he took into possession. Thereafter he "took her down" (R. p. 95) to the Immigration station; that his taking her into custody and keeping her at the Immigration station resulted in her being charged criminally before Judge McLaughlin, Chief Judge of the United States District Court for Hawaii, who dismissed the case for the reason that the acts of the appellant then complained of did not constitute the crime charged. His testimony went on to show that no warrant of arrest had been procured or served on appellant until after she had signed the written statement, Exhibit No. 6.

Forte v. United States, 94 F. 2d 236 at page 240 is authority in support of appellant's contention that "there can be no conviction of an accused in a criminal case upon an uncorroborated confession" and of the further rule represented by what the court expressly said it thought represented the weight of authority and the better view in Federal Courts, that such corroboration is not sufficient if it tends merely to support the confession, without also embracing substantial evidence of the *corpus delicti* and the whole thereof.

An accused person's extrajudicial admissions of essential facts or elements of crime if made after commission of the crime are of same character as confessions and corroboration should be required.

Opper v. United States, 348 U.S. 84 (head note 3).

The general rule that an accused may not be convicted on his own uncorroborated confession has previously been recognized by this Court, *Warszawer v. United States,* 159 U.S. 487; cf. *Miles v. United States,* 103 U.S. 304, 311-312, and has been consistently applied in the lower federal courts and in the overwhelming majority of state courts, 127 ALR 1130; 7 Wigmore, Evidence, sec. 2070-2072. Its purpose is to prevent "errors in convictions based upon untrue confessions alone," *Warszower v. United States, supra,* at 347; its foundation lies in a long history of judicial experience with confessions and in the realization that sound law enforcement requires police investigations which extend beyond the words of the accused. Confessions may be unreliable because they are coerced or induced, and although separate doctrines exclude involuntary confessions from consideration by the jury, *Brown v. United States, supra, Wilson v. United States, supra,* further caution is warranted because the accused may be unable to establish the involuntary nature of his statement. Moreover, though a statement may not be "involuntary" within the meaning of this exclusionary rule, still its reliability may be suspect if it is extracted from one who is under pressure of a police investigation,—whose words may reflect the strain and confusion attending his predicament rather than a clear reflection of his past.

Smith v. United States, 348 US. 147, 152-153.

The need for corroboration extends beyond complete and conscious admission of guilt,—a strict confession. Facts admitted that are immaterial as to guilt or innocence need no dis-

cussion. But statements of the accused out of court that show essential elements of the crime, here payment of money, necessary to supplement an otherwise inadequate basis for a verdict of conviction stand differently. Such admissions have the same possibilities for error as confessions. They, too, must be corroborated.

Opper v. United States, 348 U.S. 84, 91.

SPECIFICATION NO. 3.

THE REFUSAL OF DEFENDANT'S REQUESTED INSTRUCTION NO. 18 WAS ERRONEOUS.

For convenience's sake the requested instruction is again set forth.

Defendant's Requested Instruction No. 18.

> No person lawfully in the United States, whether citizen thereof or alien, is required to have a passport in travelling from one part of the United States to any other part thereof.
>
> And in this connection I instruct you that at all times referred to in the indictment defendant was lawfully in the United States and that Hawaii, Guam, and Wake are parts of the United States (R. p. 7).

All counts of the indictment grow out of a single transaction, namely: procurement of a passport by defendant, for travel between Hawaii and Guam.

Admittedly such a passport is wholly unnecessary.

SPECIFICATION NO. 4.

THE OVERRULING OF THE MOTION FOR A JUDGMENT OF ACQUITTAL WAS ERRONEOUS.

We urge that the motion for judgment of acquittal uld have been granted. This is demonstrated by argument in support of Specifications Nos. 1, 2, l 3, and each of them.

CONCLUSION.

The appellant contends that for the reasons set th above the verdict should be set aside and a v trial granted.

Dated, Honolulu, Hawaii,
March 19, 1956.

Respectfully submitted,
O. P. SOARES,
Attorney for Appellant.

No. 14,915

IN THE

United States Court of Appeals

For the Ninth Circuit

FLORENCE ALICE PAQUET,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

On Appeal from the District Court of the United States for the District of Hawaii.

BRIEF FOR APPELLEE.

LOUIS B. BLISSARD,
United States Attorney,
District of Hawaii,
CHARLES B. DWIGHT III,
Assistant United States Attorney,
District of Hawaii,
LLOYD H. BURKE,
United States Attorney,
Northern District of California,
Attorneys for Appellee.

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No. 14,915

IN THE

United States Court of Appeals

For the Ninth Circuit

'LORENCE ALICE PAQUET,
Appellant,

vs.

JNITED STATES OF AMERICA,
Appellee.

On Appeal from the District Court of the United States for the District of Hawaii.

BRIEF FOR APPELLEE.

JURISDICTIONAL STATEMENT.

The appellee agrees with the jurisdictional statement of appellant but adds that appellant was adjudged guilty and sentenced (R. pp. 8-10) on August 3, 1955, and additional jurisdictional statute is found : 28 U.S.C., Section 1294.

STATEMENT OF THE CASE.

The appellee adds to statement of the case by ne appellant in the following respects.

The exhibits complained of were introduced also in connection with all counts of the indictment. That they were introduced over objection (Ex. 1, R. 30; Ex. 2, R. 38; Ex. 3, R. 34; Ex. 4, R. 109; Ex. 5, R. 96; Ex. 6, R. 108).

The appellee states that all of the extrajudicial admissions elicited from George L. Elms (R. pp. 82-95) were as a result of responsive answers of Mr. Elms to appellant's counsel on cross-examination. These were not objected to by appellant and were not therefore raised by motion for acquittal. (R. p. 147). The defense put them in evidence.

STATUTES INVOLVED.

18 U.S.C. Section 1542.

False statement in application and use of passport.

Whoever willfully and knowingly makes any false statement in an application for passport with intent to induce or secure the issuance of a passport under the authority of the United States, either for his own use or the use of another, contrary to the laws regulating the issuance of passports or the rules prescribed pursuant to such laws; or

Whoever willfully and knowingly uses or attempts to use, or furnishes to another for use any passport the issue of which was secured in any way by reason of any false statement—

Shall be fined not more than $2,000 or imprisoned not more than five years, or both.

18 U.S.C. Section 911.

Citizen of the United States.

Whoever falsely and willfully represents himself to be a citizen of the United States shall be fined not more than $1,000 or imprisoned not more than three years, or both.

Section 290(d), Immigration and Nationality Act, ct of June 27, 1952, Sec. 290(d), 66 Stat. 234; 8 .S.C. §1360(d).

Establishment of central file; information from other departments and agencies.

(d) A written certification signed by the Attorney General or by any officer of the Service designated by the Attorney General to make such certification, that after diligent search no record or entry of a specified nature is found to exist in the records of the Service, shall be admissible as evidence in any proceeding as evidence that the records of the Service contain no such record or entry, and shall have the same effect as the testimony of a witness given in open court. June 27, 1952, c. 477, Title II, ch. 9, §290, 66 Stat. 234; 1953 Reorg. Plan No. 1, §§5, 8 eff. Apr. 11, 1953, 18 F.R. 2053, 67 Stat.

Section 215, Immigration and Nationality Act, Act June 27, 1952, Sec. 215, 66 Stat. 190, 8 U.S.C. §1185.

Travel control of citizens and aliens during war or national emergency—Restrictions and prohibitions on aliens.

(a) When the United States is at war or during the existence of any national emergency proclaimed by the President, or, as to aliens,

whenever there exists a state of war between or among two or more states, and the President shall find that the interests of the United States require that restrictions and prohibitions in addition to those provided otherwise than by this section be imposed upon the departure of persons from and their entry into the United States, and shall make public proclamation thereof, it shall, until otherwise ordered by the President or the Congress, be unlawful.

R.S. 161; 5 U.S.C. Section 22.

Departmental regulations. The head of each department is authorized to prescribe regulations, not inconsistent with law, for the government of his department, the conduct of its officers and clerks, the distribution and performance of its business, and the custody, use, and preservation of the records, papers, and property appertaining to it. (R.S. §161.)

28 U.S.C. Section 1733(b).

Government records and papers; copies

(b) Properly authenticated copies or transcripts of any books, records, papers or documents of any department or agency of the United States shall be admitted in evidence equally with the originals thereof.

Proclamation No. 3004, January 17, 1953;
67 Stat. C31.

CONTROL OF PERSONS LEAVING OR ENTERING THE UNITED STATES

BY THE PRESIDENT OF THE UNITED STATES OF AMERICA

A PROCLAMATION

WHEREAS section 215 of the Immigration and Nationality Act, enacted on June 27, 1952 (Public Law 414, 82nd Congress; 66 Stat. 163, 190), authorizes the President to impose restrictions and prohibitions in addition to those otherwise provided by that Act upon the departure of persons from, and their entry into, the United States when the United States is at war or during the existence of any national emergency proclaimed by the President or, as to aliens, whenever there exists a state of war between or among two or more states, and when the President shall find that the interests of the United States so require; and

WHEREAS the national emergency the existence of which was proclaimed on December 16, 1950, by Proclamation 2914 still exists; and

WHEREAS because of the exigencies of the international situation and of the national defense then existing Proclamation No. 2523 of November 14, 1941, imposed certain restrictions and prohibitions, in addition to those otherwise provided by law, upon the departure of persons from and their entry into the United States; and

WHEREAS the exigencies of the international situation and of the national defense still require

that certain restrictions and prohibitions, in addition to those otherwise provided by law, be imposed upon the departure of persons from and their entry into the United States:

NOW, THEREFORE, I, HARRY S. TRUMAN, President of the United States of America, acting under and by virtue of the authority vested in me by section 215 of the Immigration and Nationality Act and by section 301 of title 3 of the United States Code, do hereby find and publicly proclaim that the interests of the United States require that restrictions and prohibitions, in addition to those otherwise provided by law, be imposed upon the departure of persons from, and their entry into, the United States; and I hereby prescribe and make the following rules, regulations, and orders with respect thereto:

1. The department and entry of citizens and nationals of the United States from and into the United States, including the Canal Zone, and all territory and waters, continental or insular, subject to the jurisdiction of the United States, shall be subject to the regulations prescribed by the Secretary of State and published as sections 53.1 to 53.9, inclusive, of title 22 of the Code of Federal Regulations. Such regulations are hereby incorporated into and made a part of this proclamation; and the Secretary of State is hereby authorized to revoke, modify, or amend such regulations as he may find the interests of the United States to require.

* * * * *

To the extent permitted by law, this proclamation shall take effect as of December 24, 1952.

IN WITNESS WHEREOF, I have hereunto set my hand and caused the Seal of the United States of America to be affixed.

DONE at the City of Washington this 17th day of January in the year of our Lord nineteen hundred and fifty-three and of (SEAL) the Independence of the United States of America the one hundred and seventy-seventh.

HARRY S. TRUMAN

By the President:
DEAN ACHESON
Secretary of State

REGULATIONS.

8 C.F.R. Section 2.2.

Certification of nonexistence of record. The chief of the Records Administration Branch of the Central Office may certify the nonexistence in the records of the Service of an official file, document, or record pertaining to a specified person or subject.

22 C.F.R. Section 1.1.

Officers authorized to sign and issue certificates of authentication. An officer or employee of the Department of State designated as Authentication Officer or as an Acting Authentication Officer of said Department may, and he is hereby authorized to, sign and issue certificates of authentication under the seal of the Department of State for and in the name of the Secretary of State

or Acting Secretary of State. The form of authentication shall be as follows:

In testimony whereof, ..., Secretary of State, have hereunto caused the seal of the Department of State to be affixed and my name subscribed by the Authentication Officer of the said Department, at the City of Washington, in the District of Columbia, This ..... day of ....., 19.....

.....
Secretary of State

By.....
Authentication Officer,
Department of State

(R.S. 161; 5 U.S.C. 22) [Dept. Reg. 13, 10 F.R. 13396, redesignated by Dept. Reg. 108.77 13 F.R. 6349]

22 C.F.R. Section 53.1.

Limitations upon travel. No citizen of the United States or person who owes allegiance to the United States shall depart from or enter into or attempt to depart from or enter into the continental United States, the Canal Zone, and all territories, continental or insular, subject to the jurisdiction of the United States, unless he bears a valid passport which has been issued by or under authority of the Secretary of State and which, in the case of a person entering or attempting to enter any such territory, has been verified by an American diplomatic or consular officer either in the foreign country from which he started his journey, or in the foreign country in which he was last present if such country is

not the one from which he started his journey, or unless he comes within one of the exceptions prescribed in §§ 53.2 and 53.3. No fee shall be collected by a diplomatic or consular officer of the United States for or in connection with such verification.

22 C.F.R. Section 53.2.

Exceptions to regulations in § 53.1. No valid passport shall be required of a citizen of the United States or a person who owes allegiance to the United States:

(a) When traveling between the continental United States and the Territory of Hawaii, Puerto Rico, and the Virgin Islands, or between any such places; or

(b) When traveling between the United States and any country or territory in North, Central or South America or in any island adjacent thereto; Provided, That this exception shall not be applicable to any such person when traveling to or arriving from a place outside the United States via any country or territory in North, Central or South America or in any island adjacent thereto, for which a valid passport is required under §§ 53.1-53.9; or

(c) When departing from or entering the United States in pursuit of the vocation of seaman; or

(d) When departing from or entering into the United States as an officer or member of the enlisted personnel of the United States Army or the United States Navy on a vessel operated by the United States Army or the United States Navy; or

(e) When traveling as a member of the armed forces of the United States or a civil employee of the War or Navy Departments between the continental United States, the Canal Zone, and all territories, continental or insular, subject to the jurisdiction of the United States, and any foreign country or territory for which a valid passport is required under the regulations in this part: Provided, That he is in possession of a document of identification issued for such purposes by the War or Navy Departments; or

(f) When specifically authorized by the Secretary of State, through the appropriate official channels, to depart from or enter into the continental Untied States, the Canal Zone, and all territories, continental or insular, subject to the jurisdiction of the United States.

[Dept. Order 1003 (DR 299-x), 6 F.R. 6069, as amended by Dept. Reg. 11, 10 F.R. 11046 and at 13 F.R. 7637]

22 C.F.R. Section 53.9.

Definition of the term "continental United States". The term "continental United States", as used in this part, includes the territory of the several States of the United States and Alaska.

SUMMARY OF ARGUMENT.

The admission of all exhibits was proper. Appellant's requested instruction No. 18 is erroneous as a matter of law. The admission in evidence of testimony as to oral admissions was fully corroborated.

ıe admission of the written statement of the appel-
ıt was proper in view of the fact that the *corpus*
licti had been established and the confession cor-
brated.

ARGUMENT.

ADMISSION OF DOCUMENTARY EVIDENCE.

hibit 1—The Certificate of Non-Existence of Citizenship Record.

This certificate is as set out below.

56347/918

July 8, 1955

CERTIFICATE OF NON-EXISTENCE OF CITIZENSHIP RECORD

I, Hildred L. Hardin, hereby certify to the following:

1. That I am Chief, Records Administration and Information Branch, Administrative Division, of the Central Office, Immigration and Naturalization Service, United States Department of Justice, and by virtue of such position and authority contained in 8 C.F.R. 2.2, and Section 290(d) of the Immigration and Nationality Act, that I am custodian of all records of the Central Office of the United States Immigration and Naturalization Service, including records relating to Citizenship and Naturalization created or maintained pursuant to 8 U.S.C. 1450, 1452, 1454, and 1501, and required to be filed with the Commissioner of Immigration and Naturalization pursuant to regulations of the Attorney General. The Central Office of the United States Immigration and Naturalization Service maintains records of all

persons naturalized in the United States during the period from September 1906 to date.

I hereby certify that no record whatsoever evidencing United States citizenship of a person by the name of Florence Alice Paquet, alias Betty Mehan, alias Alice Smith, alias Mrs. Ted Lane, exists in the Central Office of the United States Immigration and Naturalization Service.

H. L. Hardin, Chief
Records Administration and
Information Branch.

As can readily be seen from the certificate itself, it is based primarily upon Section 290(d), Immigration and Nationality Act and Section 2.2, 8 C.F.R. Section 290(d) provides:

> A written certification signed by the Attorney General or *by any officer of the Service designated by the Attorney General* to make such certification, that after diligent search no record or entry of a specified nature is found to exist in the records of the Service, shall be admissible as evidence in any proceeding as evidence that the records of the Service contain no such record or entry, and shall have the same effect as the testimony of a witness given in open court. (Emphasis added.)

Section 2.2, 8 C.F.R. provides:

> The Chief of the Records Administration Branch of the Central Office may certify the nonexistence in the records of the Service of an official file, document, or record pertaining to a specified person or subject.

The two sections above read together show the au-
ority of the named persons making the certification
d the authority for admitting a document of this
pe in evidence. The one remaining question to be
solved then is the wording of the certification.

The certificate reads in part as follows:

> That I am Chief, Records Administration and Information Branch, Administrative Division, of the Central Office. * * * and by virtue of such position and authority contained in 8 C.F.R. 2.2, and Section 290(d) of the Immigration and Nationality Act * * *. I hereby certify that no record whatsoever evidencing United States Citizenship of a person by the name of Florence Alice Paquet * * *, exists in the Central Office of the United States Immigration and Naturalization Service.

It is the contention of the appellee that this cer-
icate meets the requirements of the statute for the
llowing reasons.

It is clear that the authority of Hildred L. Hardin,
ief, Records and Administration Branch, Central
fice, to make the certification is set out in Section
60(d), 8 U.S.C. and in Section 2.2, 8 C.F.R.

Reference was made to the statutes and regulations
ving the certifier authority. It is noted that the
atutory reference uses the words "after a diligent
arch." It is contended that by reference the full
port of the statutory requirements are complied
th. That is "after a diligent search." Here it is

clear that Hildred Hardin had this section (Section 1360(d)) in mind when the certification was made.

Reference was also made to the regulations promulgated by the Attorney General (8 C.F.R. 2.2) and it is here that the administrative interpretation of the statute comes into play. As set forth above the certification follows the regulations as closely as possible. It is certainly a fair interpretation that both the statute and the regulations were complied with in the execution of this certificate.

Assuming for the purpose of this brief that the statute was not complied with. Where is the prejudicial error? Could appellant have been convicted without this certificate? Error must be regarded as harmless if upon examination of entire record substantial prejudice does not appear. *Sang Soon Sur v. U. S.,* 167 F.(2d) 431 (9th Cir. 1948); *Ah Fook Chang v. U. S.,* 91 F.(2d) 805 (9th Cir. 1937). An error which could not affect result may be disregarded. *Brown v. Allen,* 344 U.S. 443. See also *Wolcher v. U. S.,* 200 F.(2d) 493 (9th Cir. 1952). The appellee's case consisted of the passport application (Ex. 2, Ex. 3); the United States Passport (Ex. 4); the Canadian Passport (Ex. 5); and the appellant's confession (Ex. 6). The evidence adduced by the government therefore consisted of the following. A Canadian Passport with appellant's name and picture thereon, which was voluntarily turned over to Mr. Elms the day following appellant's civil arrest in deportation, March 31, 1955 (R. pp. 79-81), which contained and exemplified: (1) Canadian citizenship; (2) Birth at Inverness, Canada.

e application for the passport (Ex. 2, 3) showed th at Barre, Vermont, its filing date and a picture ached. About the picture Mr. Cummins testified t the photograph was of the appellant (R. pp. 24,). The United States Passport was linked to the pellant and identified by Miss Prendergast (R. pp. 53, 54, 60).

Mr. Keane's testimony laid the ground work by ntifying the appellant by identifying the passport d by stating the circumstance of the March 30th nsaction (R. pp. 64-70).

With this evidence, there was shown the application a United States Passport by appellant, the issue of a United States Passport to appellant, a representation as a United States citizen upon the passport plication by appellant, the passing through immiation inspection by presenting a United States Passrt by appellant and a representation of United ates citizenship by appellant to the Immigrant Inector. Together with the above is added the Cadian Passport as evidence of alienage of the apllant and of the time, and place of her birth. Therere, it is contended that there was shown more than e bare *corpus delicti,* that is proof that a crime has en committed and that someone committed it. (*U. S. Echeles,* 222 F.(2d) 144, 7th Cir. 1955). There is ded the final element also that the appellant comtted the offense. There is much more here than the re *corpus delicti* without Exhibit 1. Therefore, there as no prejudicial error and the admission of the apllant's confession was not error but proper.

Exhibit 3—Duplicate Original of Passport Application.

Exhibit 3 in evidence was presented by Miss Prendergast, the Passport Administrator, from her files. It was identified by Thomas Cummins and by Miss Prendergast. This document was a duplicate original (R. p. 27). The appellant was linked with the application (R. pp. 24, 26). It appears further that there is no substantial argument—this is material to the offenses charged in the indictment. It was properly admitted in evidence.

Exhibit 2—Photographic Copy of Application for Passport.

Exhibit 2 in evidence is a photographic copy of the duplicate original of Exhibit 3. It carries the authentication exactly as that found in 22 C.F.R. 1.1 issued under authority (R.S. 161; 5 U.S.C. 22). This authenticated photographic copy from the files of the Department of State is admissible equally with the original thereof (28 U.S.C. § 1733(b)). This exhibit was identified by Mr. Cummins (R. pp. 22-24) and by Miss Prendergast (R. p. 53) and linked with the appellant (R. p. 24). There is no worthwhile argument as to the materiality of this exhibit. Consequently, this exhibit also was properly admitted.

Exhibit 4—United States Passport.

The United States Passport was given by the appellant to George L. Elms on request. (R. p. 94). It was identified by Miss Prendergast (R. pp. 59, 60). There is no evidence anywhere in the record that the

ted States Passport was secured by anything but ful means. Further, even if there might have been unlawful search and seizure there was no motion uppress made prior to trial. The complete record proceedings in the District Court was designated appeal. (R. p. 14). The motion made during the l was not timely. Rule 41(e), Federal Rules of minal Procedure; *U. S. v. Di Re,* 2nd Cir. 1947, F.(2d) 818, aff. 332 U.S. 581. There was no sur- se involved. Rule 41(e), Federal Rules of Criminal cedure; *U. S. v. Di Re, supra.* Where appellant not move before trial to suppress evidence or ex- n his failure to do so, no complaint can be made appeal of admission of such evidence. *Cromer v. S.* (D.C. Cir. 1944), 142 F.(2d) 697, cert. denied U.S. 760. Viewing the record concerning this ibit there was no abuse of discretion on the part he District Court.

o set the record straight James Keane is a United tes Immigrant Inspector and has power to ques- n "any person believed to be an alien as to his nt to be or to remain in the United States" (8 S.C. § 1357(a)) and to search without a warrant person and personal effects of any person seeking nission to the United States. (8 U.S.C. § 1357(c)). gardless of what powers Mr. Keane possessed he ified that appellant presented him with the United tes Passport (R. pp. 65-66), which he later re- ned to appellant (R. p. 68). Nor was appellant ecosted" by Mr. Keane (Appellant's Brief p. 7). pellant was passing through Immigration inspec-

tion and was required to present credentials to Mr. Keane who was the Immigrant Inspector on duty (R. p. 65).

Further to clarify the record, 288-A Wai Nani Way is not the home of the appellant, but is the residence of a friend (R. p. 113). (See Appellant's Brief pp. 7-8). George L. Elms was given the United States Passport (Ex. 4) at this address and on the following day the appellant gave him the Canadian Passport (R. p. 80). (Compare Appellant's Brief p. 8).

Despite a lengthy cross-examination by appellant's counsel there was no evidence whatsoever that the passport was procured in anything but a lawful manner. (R. pp. 82-95). This exhibit was properly admitted.

Exhibit 5—Canadian Passport.

The only evidence concerning the Canadian Passport is that the appellant presented it to Mr. Elms (R. p. 80), nor was there any cross-examination concerning the Canadian Passport. Mr. Elms identified it and connected it with the appellant. (R. pp. 79-81). The Court will note that this passport was turned over to Mr. Elms on March 31, 1955, the day after the transaction at 288-A Wai Nani Way. The only evidence shows that it was voluntarily turned over to Elms. There appears to be no substantial question involved in the admission or relevancy of this exhibit. The Canadian Passport was properly admitted.

ıibit 6—Written, Signed, Sworn Statement of the Appellant.

Reference is made to the argument *supra* concern-
Exhibit 1. The evidence sustaining the fact that a
rpus delicti had been established is outlined there.
e addition could be made. The testimony of George
ns concerning the voluntariness of the confession.
. pp. 105-106). The admission of the confession in
dence depends upon the admission of other evi-
ıce amounting to proof of the *corpus delicti*. This
urt has held that the *corpus delicti* need not be
ɔved beyond a reasonable doubt (*D'Aquino v. U. S.,*
2 F.(2d) 328, cert. denied 343 U.S. 935, rehearing de-
d 343 U.S. 958), or the offense by a preponderance
the evidence (*Davena v. U. S.,* 198 F.(2d) 230, cert.
ıied 344 U.S. 878; *Smith v. U. S.,* 348 U.S. 147, 156.
e also *Opper v. U. S.,* 348 U.S. 84, 93). It is the
ıtention of the appellee that the offense itself with-
t the confession was proved at least by a pre-
nderance of the evidence and possibly beyond a
ısonable doubt. Certainly even measured by the
ɔst stringent standards of corroboration, this con-
ɔsion is admissible.

The appellee contends that all six exhibits were
ɔperly admitted and no error was committed by the
strict Court.

ADMISSION AND CONFESSION OF APPELLANT.

The admissibility of the written statement of the appellant (Ex. 6) has been discussed *supra* and disposed of there.

The appellee is somewhat perplexed by the objection of the appellant to the oral admissions of the appellant elicited from George L. Elms on cross-examination by counsel for appellant. (R. pp. 82-95). These admissions found their way into evidence by responsive answers to questions propounded by appellant. The appellant is objecting to evidence which was adduced through her own efforts. But be that as it may, the admissions if appellee is to be made responsible for them certainly meet the corroboration tests of the *Smith* and *Opper* cases, *supra.*

As to the testimony of James Keane there are two statements which he testified that appellant made. He asked appellant if the United States Passport was hers and received an affirmative answer (R. p. 67). He asked her also if she were born in Barre, Vermont, and her answer was yes (R. p. 67). The first statement is an admission and certainly is a well corroborated admission and is admissible (*Opper v. U. S., supra; Smith v. U. S., supra*). The second statement was put in evidence not to show the truth of the statement but to show that the statement had been made. It is admissible. *Murray v. U. S.,* 10 F.(2d) 409, cert. denied 271 U.S. 673; *Hicks v. U. S.,* 173 F.(2d) 570, cert. denied 337 U.S. 945; *Braswell v. U. S.,* 200 F.(2d) 597.

REFUSAL OF DEFENDANT'S REQUESTED INSTRUCTION NO. 18.

The instruction in issue is found at R. p. 7 and appellant's Brief page 12. In connection with this instruction appellant makes the following statement, "All counts of the indictment grow out of a single transaction, namely: procurement of a passport by defendant, for travel between Hawaii and Guam. Admittedly such a passport is wholly unnecessary." (Appellant's Brief p. 12).

Appellee's answer is that this statement is erroneous.

Supporting our contention that a passport is required for travel between Hawaii and Guam are the following statute, Presidential Proclamation and Regulations: Act of June 27, 1952, Sec. 215, 66 Stat. 163, 0, 8 U.S.C. 1185; Presidential Proclamation No. 04, 67 Stat. C31; 22 C.F.R. §§ 53.1-53.9.

Under Section 215, Immigration and Nationality t, the President is empowered to make restrictions d prohibitions in addition to those provided in that tion during time of National Emergency proclaimed the President.

President Truman did this on January 17, 1953 in roclamation No. 3004. In this proclamation he inrporated by reference the provisions of Title 22, F.R. §§ 53.1-53.9. These prohibit the entry or drture from any Territory or Insular Possession thout a passport. (22 C.F.R. 53.1). Excepted from is rule is travel to and from Hawaii, Puerto Rico, d the Virgin Islands and countries in North, Cen-

tral, and South America. (22 C.F.R. 53.2). Continental United States is defined as the Several States and Alaska. (22 C.F.R. 53.9). It is to be noted that provisions exempting travel to and from Guam are conspicuous by their absence. It is obvious then that a passport is needed for travel between Hawaii and Guam during a period of National Emergency proclaimed by the President.

Turning to appellant's requested instruction No. 18, it is obvious that during a time of National Emergency proclaimed by the President that this instruction is erroneous. Further, even when there is no National Emergency, the instruction would have no application to Count I and Count III. The false procuring of the passport is the essence of the offense and the purpose in securing it or its proposed use is immaterial. In that sense, it would be misleading to the jury.

MOTION FOR ACQUITTAL.

In view of the argument presented above, the denial of the motion for acquittal was proper and no error was committed.

CONCLUSION.

It is respectfully submitted that all exhibits were properly admitted, that the motion to strike the exhibits was properly denied, and that the denial of the motion for acquittal was sound.

ne judgment of the District Court should be af-
ed.

ated, Honolulu, T. H.,
April 20, 1956.

LOUIS B. BLISSARD,
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District of Hawaii,
CHARLES B. DWIGHT III,
Assistant United States Attorney,
District of Hawaii,
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No. 14,915

IN THE

United States Court of Appeals

For the Ninth Circuit

FLORENCE ALICE PAQUET,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

On Appeal from the District Court of the United States for the District of Hawaii.

APPELLANT'S ANSWERING BRIEF.

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BERNAU-WALSH PRINTING CO., SAN FRANCISCO, CALIFORNIA

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No. 14,915

IN THE

United States Court of Appeals

For the Ninth Circuit

ORENCE ALICE PAQUET,
Appellant,

vs.

NITED STATES OF AMERICA,
Appellee.

On Appeal from the District Court of the United States for the District of Hawaii.

APPELLANT'S ANSWERING BRIEF.

Answering appellee's argument in reply to appel-t's several claims of error in the Court below, the lowing is respectfully submitted:

I.

EXHIBIT 1.—THE CERTIFICATE OF NON-EXISTENCE OF CITIZENSHIP RECORD.

Appellee treats Exhibit 1 as if it consisted of the tificate of non-existence of citizenship record only.

Exhibit 1 is in two parts, namely: (1) a certification the Assistant Commissioner, Administrative Di-ion, Immigration and Naturalization Service, E. A.

Loughran, (hereinafter, for convenience's sake, referred to as the "Loughran certificate"). (2) A certificate by the Chief of Records Administration and Information Branch, in the same service, H. L. Hardin.

For convenience's sake these two certificates together comprising Exhibit 1 are herein referred to as the "Loughran certificate" and the "Hardin certificate", respectively.

The Loughran certificate certifies two things:

1. That the attached document (that is, the Hardin certificate denominated "Certificate of Non-Existence of Citizenship Record") is from the files of the Immigration and Naturalization Service;

2. That the signature on the aforesaid document is true and genuine.

Of Loughran's *authority* to make the certificate bearing his signature, appellant raises no question.

The point made by appellant is that however clear the *authority* to make it, the certificate made by Loughran is ineffective and being ineffective, the rest of the exhibit should not have been received in evidence. Appellee nowhere in its brief controverts this claim. Nor does appellee point out that Loughran had the custody of that document to which he certified. This is a prime requisite.

In connection with appellant's contention that Exhibit 1, or any part thereof, should not have been received in evidence, appellee's argument is limited to the admissibility of the portion of Exhibit 1 de-

minated, Certificate of Non-Existence of Record as ade by Hardin.

Appellee argues (pp. 13 and 14) that the require- ent of the statute, the rules, and the regulations on e subject that the certificate of non-existence of cord must *contain a statement* that the certificate is ade "after a diligent search," is complied with be- use of something which Hardin had in his mind. nfortunately the law does not give effect to undis- osed mental reservations. The requirement of all e applicable statutes, rules, and regulations is un- uivocal that not only must there in fact be a diligent arch before the certificate of non-existence is made, t that the fact of such a search shall be stated in e certificate in just so many words.

Appellee argues that substantial prejudice from the ror complained of does not appear and hence is so rmless that it is to be disregarded, citing *Sang Soon ır v. U. S.,* 167 F. (2d) 431; *Ah Fook Chang v. U. S.,* F. (2d) 805; *Wolcher v. U. S.,* 200 F. (2d) 493, all ses decided by this Court, and all remanded for new ial.

In the last of the above listed cases (*Wolcher v. . S.*) this Court said:

> The rule which we endeavor to apply is stated in *Kotteakos v. United States,* 328 U. S. 750, 764; 66 S. Ct. 1239, 1248; 90 L. Ed. 1557: "If, when all is said and done, the conviction is sure that the error did not influence the jury, or had but very slight effect, the verdict should stand, except perhaps where the departure is from a constitutional norm or a specific command of Congress. * * * But

> if one cannot say with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected. The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand."

The gravamen of appellant's offense is that she falsely claimed American citizenship. To overcome this, since appellee's position is that with a showing of defendant's foreign birth, if for no other reason than to accord her the fundamental and basic right of the presumption of innocence, it was essential to establish that she had not been naturalized. The only proof attempted was in the form of the certificate of non-existence of a record showing such fact. (Ex. No. **1.**)

It is respectfully submitted that the reference in Section 290 (d) Immigration and Nationality Act, act of June 27, 1952, Sec. 290 (d), 66 Stat. 234; 8 USC, Sec. 1360 (d) to a showing of "diligent search", is just such "a specific command of Congress" that the Supreme Court of the United States was adverting to in *Kotteakos v. United States, supra.*

II.

ADMISSION IN EVIDENCE OF ORAL AND WRITTEN (EXHIBIT 6) STATEMENTS OF DEFENDANT IN NATURE OF CONFESSIONS.

As to appellee's argument that the admissions complained of "found their way into evidence by responsive answers to questions propounded by appellant," the fact is that the questions propounded by appellant (R. pp. 82-95) were put to him under the circumstances recorded on page 81 of the record, to which appellee makes no reference in its brief.

As it is brief but nonetheless important, it is here set out:

> Mr. Dwight. I will now offer in evidence Plaintiff's Exhibit No. 5 for identification. (Note: This is the "Canadian Passport").
>
> Mr. Soares. Object to it on the grounds that it is incompetent, irrelevant and immaterial and has not been properly identified. And it was taken from the witness under duress and will only serve the purpose of getting admissions or confessions in, and the corpus delicti has not been shown.
>
> The Court. The part of your grounds where you talk about duress, Mr. Soares, there has been no foundation laid that there was no duress. Do you wish to examine the witness on voir dire in that matter?
>
> Mr. Soares. Yes, if the Court please.
>
> The Court. You may.

It will be noted that defendant's examination of the witness Elms on the basis of whose testimony the Canadian passport was received in evidence was confined to the testimony given on direct.

Appellee's statement that, "The appellant is objecting to evidence which was adduced through her own efforts" is wholly untenable and is not borne out by the record.

On the question of admissions and confessions there are here involved two points, namely: (1) that they were not voluntarily made, and (2) that they are not corroborated.

That they were not voluntarily made amply appears. While no physical violence was offered, defendant did not have that "mental freedom" which the Supreme Court has said a defendant must possess to make the admissions and confessions admissible. (*Ashcraft v. Tennessee,* 322 U.S. 145, 88 L.Ed. 1192; and *Lyons v. Oklahoma,* 322 U.S. 596, 88 L.Ed. 1481.)

It is also well-settled that even when admissions and confessions are otherwise admissible, they cannot be received as evidence unless corroborated. Despite the tendency of the Courts to be less stringent as to the *quantum* of corroborating evidence, so far as appellant has been able to ascertain no Appellate Court has ever held that evidence erroneously received may be used as corroboration.

III.

Specification No. 3, claiming error in the refusal of defendant's requested instruction No. 18 is withdrawn at this time.

CONCLUSION.

ppellant again respectfully submits that a new l should be granted.

ated, Honolulu, Hawaii,
May 21, 1956.

Respectfully submitted,
O. P. SOARES,
Attorney for Appellant.

No. 14,915

IN THE

United States Court of Appeals

For the Ninth Circuit

LORENCE ALICE PAQUET,

Appellant,

vs.

NITED STATES OF AMERICA,

Appellee.

On Appeal from the District Court of the United States for the District of Hawaii.

APPELLANT'S PETITION FOR A REHEARING.

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NAU-WALSH PRINTING CO., SAN FRANCISCO, CALIFORNIA

No. 14,915

IN THE

United States Court of Appeals

For the Ninth Circuit

LORENCE ALICE PAQUET,
Appellant,

vs.

NITED STATES OF AMERICA,
Appellee.

On Appeal from the District Court of the United States for the District of Hawaii.

APPELLANT'S PETITION FOR A REHEARING.

---

the Court as constituted in the original hearing of the above entitled appeal, namely: Honorable William Denman, Chief Judge; Honorable Richard H. Chambers, Circuit Judge; and Honorable Ernest A. Tolin, District Judge:

Comes now Florence Alice Paquet, appellant above ned, and presents this, her petition for a rehearing the above entitled matter, judgment in which tter was filed July 10, 1956, on the following ounds:

From a careful reading of the opinion, it appears to appellant that admittedly the two duplicate original copies of appellant's application for a passport, Exhibits 2 and 3, did not meet the requirements of F.R.C.P. 44(a), and would be admissible only if proved by some other method authorized by another equally applicable statute or by the rules of evidence at common law, citing F.R.C.P. 44(c); but in the circumstances of this case, the statutes referred to by the Court—28 U.S.C. sec. 1733(b) and 5 U.S.C. sec. 22—are not "applicable statutes". Section 1733(b) applies only to "properly authenticated copies". The authentication here can only be proper if it comes within the terms of Section 22, but Section 22 does not provide for authentication either directly or by inference. It is limited to certain specified areas in which regulations may be prescribed, which limitations can best be described as intermural activities.

Proof of documents by producing certified copies thereof was unknown to the common law. Indeed, as pointed out by writers on the subject, it was because of "the intolerable inconvenience" of the "necessary production of the original of a document", under the common law that the rule was relaxed by statutory enactment.

After pointing out that under the common law records and ancient deeds of thirty years' standing prove themselves, Mr. Blackstone states that at common law the rules of evidence as to "modern deeds

ıd other writings'' are to be proved by evidence witnesses. *Jones' Blackstone* (1916) §485(bb).

Dated, Honolulu, Hawaii,
July 31, 1956.

Respectfully submitted,
FLORENCE ALICE PAQUET,
Appellant and Petitioner,
By O. P. SOARES,
Her Attorney.

CERTIFICATE OF COUNSEL.

I, O. P. Soares, attorney for appellant and petitioner above named, do hereby certify that in my judgment the foregoing petition for a rehearing is well founded, and that it is not interposed for delay.

Dated, Honolulu, Hawaii,
August 1, 1956.

O. P. SOARES,
Attorney for Appellant and Petitioner.

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No. 14,916

IN THE

United States Court of Appeals

For the Ninth Circuit

ILTON H. OLENDER,	*Appellant,*
VS.	
NITED STATES OF AMERICA,	*Appellee.*

APPELLANT'S OPENING BRIEF.

Appellant was convicted on four counts of an indictment, ch count charging a violation of Title 18 U.S.C. Sec. 5b, attempt to evade the payment of income taxes. . 3.)[1]

Count 1. Charged the filing of a false and fraudulent rsonal income tax return for the calendar year of 1945. . 3.)

Count 2. Charged the filing of a false and fraudulent ome tax return for the calendar year 1945, for his fe Bessie B. Olender. (R. 4.)

---

[1] There had been a prior trial and conviction in this case and this urt reversed the conviction. (*Olender v. United States,* 210 F. 795.)

Count 3. Charged the filing of a false and fraudulent personal income tax return for the calendar year 1946. (R. 5.)

Count 4. Charged the filing of a false and fraudulent income tax return for the calendar year 1946, for his wife Bessie B. Olender. (R. 6.)

The Court sentenced appellant to imprisonment for a period of 3 years, to pay a fine of $20,000 and costs. (R. 9.)

From the foregoing judgments and sentences appellant prosecutes this appeal.

JURISDICTIONAL STATEMENTS.

1. *Jurisdiction of the District Court.* 18 U.S.C. Sec. 3231 provides that "The district courts of the United States shall have original jurisdiction * * * of all offenses against the laws of the United States."

2. *Jurisdiction of this Court upon appeal to review the judgment.* 28 U.S.C. Sec. 1291 provides that the Court of Appeals shall have jurisdiction on appeals from all final decisions of the District Courts of the United States, except where a direct review may be had in the Supreme Court.

28 U.S.C. Sec. 1294 provides in part that appeals from reviewable decisions of the District Courts shall be taken to the Court of Appeals for the circuit embracing the district.

3. *The pleadings necessary to show the existence of jurisdiction* are the indictment (R. 3) and the pleas of not guilty.

4. *Facts disclosing the basis upon which it is con-nded that the District Court had jurisdiction and this ourt has jurisdiction* to review the judgments in ques-on. These facts are set forth in the introductory sen-nces to this brief and will be stated more fully in the llowing abstract of the case.

ATEMENT OF THE CASE PRESENTING THE QUESTIONS INVOLVED AND THE MANNER IN WHICH THEY ARE RAISED.

General nature of the case, the theory on which it was tried and the main and secondary issues involved.

The indictment charged appellant in four counts with e filing of false and fraudulent income tax returns for nself and wife, computed on a community property sis, for the calendar years 1945 and 1946. Counts 1 and refer to the year 1945 while Counts 3 and 4 refer to the ar 1946.

The Government relied on the "net worth method" of oof and had to establish with "reasonable certainty" ppellant's net worth as of December 31, 1944, December , 1945 and December 31, 1946. (*Holland v. United States,* 8 U.S. 121, 99 L. ed. 150.)

Prior to the final trial of this case the parties entered to a written stipulation as to the assets and liabilities appellant and his wife at the close of the years 1944, 45 and 1946. Prior to the second and present trial an nended stipulation was entered into. Both stipulations ere introduced in evidence as U.S. Exhibits 11 and 11a R. 129.)

These stipulations provided that neither party was precluded from offering evidence of any character bearing on or related to wilfulness or lack of wilfulness, or evidence relating to items of assets, liabilities or expenditures of appellant or his wife not included in the stipulations; that each party shall have the right to offer evidence as to the ownership or source of the funds with which U.S. Bonds were purchased and that the stipulations should not be construed as shifting the burden of proof to defendant or relieving the prosecution from proving the charges in the manner provided by law.

The computations of the Government were incorporated in a series of tables admitted in evidence as U.S. Exhibit No. 50. (R. 412.) These computations are set forth in the Appendix at page i. With certain exceptions the Government's computations as to assets are based on the foregoing stipulations.[2]

The stipulations reserved to each party the right to introduce evidence as to further assets or liabilities and as to the ownership of any such assets or liabilities in the possession of appellant or his wife during the years involved.

The main issue involved is whether the prosecution established to a reasonable certainty the opening and closing net worth of appellant. Included in this issue are:

---

[2]The items of assets in the computations not included in the stipulations are: In 1944, the sum of $50,000 cash in safe deposit; in 1945, cashier's check for $7724, $7200 cash in safe deposit, $125.49 paid to George Belling; in 1946, $10,000 for stock in and as a loan to Asturias Corporation, and $4335.04 expenditures to various shops.

(a) The amount of cash appellant had in his safe eposit boxes at the close of the years 1944, 1945 and 946.

(b) Whether among the bonds in the possession of ppellant at the end of 1945, $20,000 thereof were the roperty of and purchased by appellant's mother.

(c) Whether appellant was entitled to be credited with n additional $20,550 at the end of 1944 as the value of ertain so-called Goodman sailor suits either on hand at iat time or the proceeds of the sale thereof.[3]

(d) Whether the sum of $7724 should have been in-uded as an asset of appellant at the end of 1945.

GOVERNMENT'S CASE IN CHIEF.

The Government first offered in evidence the income tax eturns involved in the indictment as U.S. Exhibits 1, 2, and 4. (R. 41-43.)

MEDBURY BLANCHARD, called by the Government, estified in substance as follows:

During 1947 I was a special agent of the Bureau of nternal Revenue. (R. 45.) In July of 1947 I interviewed Ir. Olender at his place of business in the Army and Navy store in Oakland. (R. 46.) He said he had done ome business with the George Goodman Agency but he idn't know how much. (R. 47.) He told me that he had

[3]The judge instructed the jury that these 3 items were, in his pinion, of critical importance (R. 928), and this Court so held n the prior appeal. (210 F. 2d 795.)

some experience in making out income tax returns and that he had made them out for his family and friends. Olender said he attended the University of California and had studied accounting there. (R. 50.)

Some days later I again saw him and asked him if he had gotten the records of his purchases from the Goodman Sales Co. He said he had and showed me a check and an invoice. It was one of his cancelled checks drawn to the George Goodman Sales Co. for sailor suits. I don't know where the check and invoice are now. (R. 51.) Olender said he had been trying to get merchandise from the East and that he had sent money back there but this was the only transaction he showed me as having apparently been completed. The check was for $1380. (R. 52.) I then investigated the records of the Bank of America in Oakland and came across some cashier's checks payable to the Goodman Sales Co. (R. 52.) The applications upon which those checks had been issued were signed with the name Milton Olender. (R. 53.)

(6 cashier's checks issued by the Bank of America were admitted in evidence as U.S. Exhibit No. 6 (R. 55); 3 checks dated January 10, 1944 payable to George Goodman for $2250 each; 2 checks dated January 22, 1944 payable to George Goodman for $2250 each and 2 checks dated January 22, 1944 payable to George Goodman for $2350 each.)

After receiving those checks I had a conversation with Mr. Olender following which he appeared at the Intelligence Unit Office. (R. 56.) I questioned Olender and the questions and answers were transcribed. (R. 56.) The paper you show me I believe is the statement I took at

iat time. Some time later I showed the transcribed state-
ient to Mr. Olender. (R. 57.) I asked Olender to read the
:atement and see if it was true. He made various com-
ients about it and made some suggestions for changing
. The paper you now show me is a carbon copy of the
:atement. (R. 58.) The interlineations in pencil and pen
id certain pieces which have been pasted on the carbon
)py containing additional typewriting information were
)ne by the stenographer and in some instances by me
fter conversing with Olender about them. (R. 59.) Where
change appears on the carbon copy the information was
rovided by Olender. I cannot state exactly the words
Ir. Olender used; that is impossible. I don't recall
hether I made any changes on that document out of
lender's presence. (R. 59.) The information in the
ianges came from Olender and was handed over by me
) the stenographer. Olender didn't come in for the re-
ised copy at all. As all this was merely part of another
ivestigation I turned the matter over to another special
gent and made no attempt to have this signed. (R. 60.)
never asked Olender to sign the statement. (R. 60.)

(The original and carbon copy of the statements were
dmitted in evidence as U. S. Exhibits 7 and 8 over the
)jection of appellant that no proper foundation had been
iid for them; that they were never signed; that they were
)t accurate and that some changes had been made by
)meone on their face.) (R. 61.)[4]

The document you show me is the invoice of the Good-
ian Sales Agency with reference to the $1380 check and

[4]The original and carbon copy of these statements were read into
vidence at page 83. An inspection of the Exhibits is necessary to
ully understand the objection.

is referred to in his statement. (U.S. Exhibit No. 9.) (R. 64.)

Cross-Examination. When I first saw Olender in 1947 he told me he thought he had done some business with the George Goodman Sales Agency of New York and said he would get me any records of those transactions that he had. (R. 66.) Some days after the first meeting Olender said he had found this one transaction with the George Goodman Co. and he showed me the check and I believe the invoice. (R. 68.) He said that was the only transaction with the Goodman Agency that he could find (R. 69), that this was the only transaction he was able to complete with the George Goodman Sales Agency. He might have said this is the only transaction I was able to complete directly with the George Goodman Sales Agency. (R. 70.)

I couldn't say that the statement of July 14, 1947 contains all the questions that were asked of and replies given by Olender. (R. 72.) I don't recall how long after taking the statement that it was transcribed. After the statement was transcribed Olender came back to the office and read the statement over. He said there were some corrections he wanted to make as there were errors in it. (R. 73.) Olender indicated the changes he wanted made and I discussed them with him and I wrote on the carbon copy what he said. (R. 74.) After the corrections were indicated by Olender the document was never retyped and was never again submitted to Mr. Olender. (R. 74.) As to the corrections on the carbon copy I believe Olender made some of them himself and some were made after he left. I can't say which corrections were made after he left. (R. 75.)

SETH L. ROOT, called by the Government, testified in ıbstance as follows:

Direct Examination. I am an Internal Revenue Agent. R. 93.) I first met with Olender on December 29, 1947 our conference room in Oakland. No one else was resent. (R. 93.) Olender stated he had prepared both his ıd his wife's returns for 1944, 1945 and 1946. (R. 94.) ı the returns for these years there appeared an item of parate income. Olender explained that his father and s uncle had been partners in certain rental property ıd businesses located in Fresno; that the uncle had died me time in the 1930's and that the uncle's children had me into the uncle's portion; that Mr. Olender's father ıssed away in 1940 and this property had been devised Mr. Olender under the terms of his father's Will; that is property formed the basis of the separate income ported. (R. 95.)

He stated the Army and Navy store was community roperty and described its business. (R. 96.) U.S. Exhibit shows U.S. Bond interest of $575.60. (R. 99.) The turn for 1946 shows Bond interest of $1720.17. Bond terests were reported as community property. (R. 100.)

We arranged for a subsequent meeting for January 12, 948 on which date I went to his store. (R. 102.) Olender resented me with the books and records of the Army and avy store and for two or three days I was engaged in aking my audit and examining the books. On January 3th Olender stated to me that I was probably making y audit as a result of Blanchard's report on certain easury currency reports. (R. 103.) I told Olender that nce Blanchard had seen him, that Blanchard had made

checks of the Express Company's records which reflected the receipt of merchandise shipped by George Goodman in January and February of 1944 and I asked him for an explanation of the Goodman transaction. He stated that he was unable to recall it. (R. 104.) I didn't find any record in Olender's books of the Goodman transactions. (R. 104.)

I spent approximately a week at Olender's examining his books and in the latter part of the week I told Olender I would like him to submit to me a comparative net worth statement, year by year from January 1, 1942 to December 31, 1947. I explained to him briefly that it should be a list of all his assets and liabilities. (R. 107.) Shortly thereafter Charles Ringo called me and said that his firm had been engaged to prepare the net worth statement and subsequently Mr. Olender brought the net worth statement to my office. Olender swore to the net worth statement in the presence of Internal Revenue Agent Cropsey. (Net Worth Statement marked U.S. Exhibit No. 10.) (R. 110.)

Cross-Examination. When the treasury currency reports came into my hands they were not accompanied by any explanation of the taxpayer. (R. 112.) I knew there was a Mr. Reed who was head of the Special Intelligence Unit. I had no information that as early as 1946 Mr. Reed had made some enquiries of Mr. Olender relating to these T.C.R. reports. I have since seen some correspondence to that effect. (R. 113.)

Olender's books and tax returns were in numerical agreement with each other. (R. 114.) The books I examined of the Army and Navy store would not customarily

ord personal income from dividends or such. A man's rsonal investments and things are kept separate and art from the records of his merchandising business. . 117.)

When Olender said he couldn't recall the circumstances the Goodman transaction he had already been shown e checks drawn to George Goodman and the applica- ns for those cashier's checks (R. 121) and he had al- ady identified his signatures on the applications for the ecks. On all the checks payable to George Goodman ey bear the endorsement "George Goodman" and below at "Pay to the order of Lafayette National Bank, Sea- ing Uniform Corporation". (R. 121.)

Re-direct Examination. I saw a record of the bonds om Mr. Ringo. I never examined the bonds. At the nk I saw the treasury currency report referring to cash hich was either used to purchase bonds or to purchase cashier's check which I determined through the bank's cords was to purchase bonds. (R. 125.)

CHARLES R. RINGO, called by the Government, testi- d in substance as follows:

Direct Examination. I am a certified public accountant th the firm of D. A. Sargent & Co. (R. 143.) I first met ilton Olender on February 16, 1948. He told me the Gov- nment was investigating his income tax and they wanted e to make a net worth statement. (R. 144.) Prior to then saw Mr. Root of the Internal Revenue Department who rst told me what the Government wanted in the net worth atement. We were to make it up by years. I abandoned at idea because it was virtually impossible to work it

out by years. Mr. Root wanted us to give a net worth statement beginning with the end of 1943 to the end of 1945 at the end of each year. (R. 146.) I never completed a yearly net worth statement. (R. 147.) To prepare the net worth statement I saw Olender's bank accounts and I had transcripts from the banks. Olender had large amounts of cash on hand and I asked him to bring me in an estimate which was purely an estimate of his net worth at the end of each year. Then I prepared questions to ask Olender and there were certain affidavits prepared by Mr. Monroe Friedman who at that time was Mr. Olender's attorney. (R. 147.) I looked over the books and records in the Army and Navy Store. (Here the books of account of the Army and Navy Store were marked U. S. Exhibits 12 to 16 for identification.) (R. 148.) Olender did not keep any record in the Army and Navy Store books of any activities other than those related to the Army and Navy Store business. (R. 149.) I couldn't find any purchases relative to the Goodman transaction in the books. (R. 152.) I talked to Olender on numerous times about the 1944 Goodman transactions. (R. 153.) Mr. Monroe Friedman was present at some of these talks. I was never given a complete explanation of the Goodman transaction. (R. 154.) I asked Olender about cashier's checks payable to George Goodman. He said he had so many transactions that he couldn't remember the particular transactions we were talking about. (R. 155.)

On May 5th we went to the safe deposit box and took an inventory of its contents. I asked Olender to bring me estimates of his net worth at the end of each year, which

e did. I summarized them and then prepared a series of
uestions asking Mr. Olender to refresh his memory and
ee what we could get as to his net worth. (R. 157.) U. S.
xhibit No. 17 is Olender's estimates of his assets and
abilities arriving at his net worth for January 1, 1942.
is in his handwriting. Exhibit No. 18 for identification
the similar data for 1948. (R. 158.) I had a similar
ueet for each of the years 1943, '44, '45, '46 and '47. I
ave up the idea of trying to make a net worth by years.
Exhibits 17 and 18 for identification received in evidence.
R. 149.)) On Exhibit 17 it shows personal cash in safe
eposit box $75,000 and an affidavit as to that amount was
ter prepared. Olender had a long story as to this $75,000
nd it was covered in the affidavit. (R. 160.) (Here witness
stifies as to Olender's statements as to how he acquired
ie $75,000.) (R. 160-162.) I brought people in to confirm
hat Olender said as to his father being wealthy and had
ie sums available. (R. 162.) Exhibit 18 states that at the
eginning of 1948 the cash in the safe deposit box was zero.
R. 162.) Exhibit 19 for identification is a summary of
ie estimated figures that were given me for the years of
ec. 31, 1941, '42, '43, '44, '45 and '46 with certain pencil
otations I have made in here. It is my summary of these
ueets. (R. 163.) The information on Exhibit 19 was taken
om the summaries furnished me by Olender in his own
andwriting. (R. 164.) The figures on the document which
have listed under "Cash in vault" were the estimated
gures given me by Olender. He told me those figures
ere the best of his recollection. In preparing the net
orth statements eventually submitted to the Government
didn't use these figures in their entirety. (R. 165.)

(Exhibit 19 admitted in evidence and under the heading "Cash in vault" shows as follows (R. 166):

December 31, 1941	$75,000
December 31, 1942	75,000
December 31, 1943	69,000
December 31, 1944	50,000
December 31, 1945	7,200
December 31, 1946	)

The document you show me is a photographic copy of the inventory I made of the contents of the safe deposit box on May 5, 1948. Safe deposit box 56, Bank of America, 12th & Broadway. (R. 169.) On the inventory I have the type of bond, the serial number of the bonds and the certificate number of the stock certificates. (R. 169.) I procured from the Bank of America the record that Olender had box 56 and box 44 which was in the name of Molly or Milton H. Olender and was opened August 18, 1944. (R. 170.) (Photostat of inventory admitted in evidence as U. S. Exhibit No. 20.) (R. 171.)

I found some Asturias Import-Export stock in the safe deposit box.

I made up a net worth statement as of December 31, 1941 and December 31, 1947. (R. 187.) U. S. Exhibit No. 10 is Olender's net worth statement that I prepared. I went over it with Olender. (R. 187.) I had originally worked up a net worth statement when Olender informed me of his payment of a single premium life insurance in the sum of $15,833.46. The effect of this figure would be to throw the net worth statement out of balance. (R. 188.) As to the Asturias stock Olender asked me to leave it out

s it was worthless. When he informed me about the life nsurance premium he said he didn't want to involve his nother or gifts from his mother. (R. 189.) Olender went own to Fresno and got a list of items he said were gifts rom his mother. (R. 190.) He said he had received gifts otalling $10,500 from his mother. A list of these gifts ppears on the last page of the net worth statement. I idn't see any records or books of Mrs. J. Olender. (R. 91.)

On Exhibit No. 10, the net worth statement, under the tem of $33,000 for bonds is the language "less held for nother purchased with her money $20,000". I received ne information as to those bonds being his mother's when identified it on the inventory I took of the bonds on Iay 5, 1948. (R. 221.)

Cross-examination. U. S. Exhibit No. 20 is the inventory I took of the safe deposit box and contains on page 2 ne heading "bonds being held for mother" and itemizes ne bonds as follows:

2¼% Treasury Bonds Nos. 906F, $5,000; 907H, $5,000; 08S, $5,000; 909K, $5,000. I took those numbers off the onds. (R. 228.) I learned that the bonds were his mother's rom what I saw at the safe deposit box. Just what that as I don't have on the inventory. (R. 229.) These bonds otalling $20,000 had some marking showing that they ere the mother's bonds. There evidently was something n the box that identified those bonds as the bonds of Mr. Olender's mother. (R. 230.)

I never made up a net worth statement for the years nding 1944, '45 and '46. I figured it would be impossible

to make up anything for those interim dates. (R. 233.) I was able to make up one for the year ending 1941 because Olender had the affidavit as to the cash he had received from his father. (R. 233.) I wouldn't say the net worth I prepared for the Government for the year ending 1941 was perfect. (R. 234.)

Referring to U. S. Exhibit No. 19, the comparative net worth statement, the figures showing the cash in vault at the end of certain years were Olender's estimates of those amounts which I asked him to bring me so I could use them as a guide and through further questioning I would try to arrive at correct figures. (R. 245.) He said the figures were purely his recollection. Olender said that some period along or following 1944 that he was constantly putting money in the safe deposit box and taking it out. (R. 246.) He told me that any number of times. He told me that his sources of income were the store, an interest in this property in Fresno, interest in Government Bonds, dividends on stock. (R. 248.) He didn't advise me of any other business activities that were capable of producing any income. (R. 249.) Before I completed the net worth statement Olender brought in the single premium life insurance policy he bought and he then stated that the $5,000 Asturias stock was worthless and would I be willing to leave it off the statement. (R. 350.) Olender brought to my attention that in 1945 he paid this $15,800 odd dollars for paid up life insurance. (R. 251.) I said we would have to include it and it would throw his net worth out. He then said he had received certain gifts from his mother but he didn't want to involve her in the case. (R.

51.) These gifts were finally included in the net worth tatement. (R. 252.)

I had a discussion with Olender and Mr. Monroe Friedman relative to the fact in April or May of 1944 there was a certain amount of money in Olender's safe deposit ox. Referring to defendant's Exhibit "B" for identification, it shows that the first talk I had with Monroe Friedman was on April 16, 1948 and the last one was September 30, 1948. My talk with Mr. Friedman about money in he safe deposit box was after my visit to the safe deposit ox in May and before September. (R. 257-8.) At that ime Monroe Friedman said there was over $70,000 in the ox when Mr. Olender took that trip and the box was urned over to Monroe Friedman. The records show that vas in 1944. I think Monroe Friedman said he counted he money at the safe deposit box both in April and May f 1944. (R. 259.) I didn't use U. S. Exhibit No. 19 for ny purpose so far as the cash in the box is concerned. R. 260.) As to U. S. Exhibit No. 19 I told the Governnent's agents I had given up the idea of trying to make n annual net worth as I figured it would be impossible; R. 263) that I didn't think you could get a interim statement as to the net worth accurately with the information had. I discussed with the Government agents on a number of times that the figures on U.S. Exhibit No. 19 were guesses all the way through. (R. 264.) U.S. Exhibit No. 19 was not intended by me to be a full, final or complete study of Olender's net worth for any of the years involved. It was merely a system of work papers for trying to get Olender to refresh his memory. The figures thereon

were originally compiled and then in the main rejected by me. (R. 268.)

Questions by the Court. When I took an inventory of the safe deposit box I believe the bonds were in an envelope or in some other form identifying them as a group. There was something on the bonds that would indicate they were the bonds of Olender's mother. (R. 202-3.)

TRUMAN H. HARLEY, Jr., called by the Government, testified in substance as follows:

In 1946 I was Personnel and Operations Officer of the Oakland main office of the Bank of America and as such it was part of my duties to prepare or supervise the preparation of Treasury Currency Reports. (R. 305.) These reports were required on transactions involving cash and currency involving large denomination bills and in amounts of over $1,000. (R. 306.) The documents you showed me (U.S. Exhibit 29) relate to currency transactions by the defendant Olender. (R. 309.) The transactions therein reported are as follows:

November 9, 1945 Check cashed for $25,000 for 250 $100 bills

November 20, 1945 A deposit of 250 $100 bills totalling $25,000

January 14, 1946—$50,000 purchase of War Bonds

December 5, 1945—2 cashier's checks purchased, one for $10,000 and one for $15,000. The memorandum states "issued cashier's check, paid cash for purchase of bonds". (R. 310)

May 29, 1946—Olender submitted $3,000 in cash for purchase of cashier's check. (R. 311)

September 19, 1946—A deposit of $1,000 and $1,500.

GEORGE L. HORNE, called by the Government, testi-ed in substance as follows:

In 1946 and 1947 I was employed as an accountant by ie Asturias Import & Export Company. (R. 321.) The mpany was a corporation in existence about a year anufacturing toys. I set up and maintained the books the corporation. (R. 322.) Olender made an investment the Asturias Corporation. U.S. Exhibit 31 is the gen-al ledger of the corporation. (R. 323.) The entry therein ows that in July of 1946 the corporation received $35,020 gainst stock that was issued. It also shows to whom the ock was issued including "Milton Olender, 500 shares, ,000." (R. 324.) There is a further entry on December , 1946 showing the receipt of $5,000 from M. Olender id was entered in the records chargeable to notes pay-le. It shows that the corporation received $5,000 as a an from Olender and is in addition to the purchase of ock in July, 1946. This $5,000 loan was not repaid to lender during the year 1946. (R. 325.) The last sales of erchandise by the corporation were in July, 1947 and ie corporation was still paying bills as of that date. (R. 26.) The records show cash receipts from the corpora-on from October 1, 1947 to January 31, 1948. I am not le to state whether the stock of the corporation was orthless as of December 31, 1946. (R. 327.)

Cross-examination. There is no record of Olender hav-ig been paid back the $5,000 which appears under Notes ayable of December 13, 1946. My opinion is the stock ecame worthless in 1947. (R. 328.) I can't tell from the ooks what the financial condition of the company was on ecember 31, 1946. As of that date the books might re-

flect some of the indebtedness of the corporation but not all of it. The book does not show any indebtedness to the bank, (R. 328) or what was owing to the stockholders. (R. 329.) There was no attempt made to make up a complete statement as of December 31, 1946. The fiscal year ended on June 30, 1947. (R. 329.) I cannot fix the date when in my opinion the stock became worthless. It was in 1947 when the corporation ceased operation at which time the corporation was insolvent. (R. 333.) I don't know whether on December 31, 1946 the assets exceeded the liabilities as I have no totals or any statements in front of me. (R. 334.)

C. F. CARROLL, called by the Government, testified in substance as follows:

I am a Special Agent employed by the Bank of America. U.S. Exhibit 34 is a cashier's check issued by the bank. Applications for cashier's checks are destroyed after five years so I have no application for that check. (R. 339.) U.S. Exhibit 34 is a cashier's check payable to the Army and Navy Store and endorsed by M. Olender. (R. 339.) The check is No. 25104696 dated November 19, 1945 for $7,724. (R. 340.) I have no record showing who purchased this check. It was returned to the bank and paid on March 27, 1946. (R. 340.) The stamps on the back show that it was cleared through some bank in New York. (R. 341.)

Cross-examination. The cashier's check for $7724 is endorsed "Army & Navy Store by M. Olender, pay to the order of Louis Levy, Army & Navy Store by Olender", then it is endorsed again "Louis Levy" and then "Saraga". (R. 345.)

HOWARD FOLEY, called by the Government, testi-ed that he was identified with an insurance company and dentified certain records and policies insuring personal roperty such as furs and jewelry for Olender from the ears 1942 on. (R. 347 to 365, 383 to 389.)

A. D. COFFMAN, testified in substance as follows:

That he was an officer of the Bank of America at resno, California and produced certain records with the ank which were marked U.S. Exhibits 40 through 48 in-usive. (R. 367.) The records pertained to bank accounts nd transactions of Molly Olender (Mrs. J. Olender) the ppellant's mother, and Terry Olender Gamborg, appel-ant's sister.

The foregoing Exhibits show the following transactions:

On February 3, 1942 Molly Olender withdrew from her avings account No. 3941 the sum of $1000 and on Febru-ry 3, 1942, $1000 was deposited in her account No. 2146. R. 370.)

On February 3, 1946 the sum of $200 was withdrawn rom account No. 2146. (R. 371.)

On March 31, 1943 $1000 was withdrawn from savings ccount No. 3941 and deposited in Molly Olender's com-nercial account. (R. 372.)

There were no withdrawals from the commercial ac-ount in the sum of $1000 or more until June 4, 1945. R. 372.)

On either January 4th or January 6th, 1944 $2000 was ithdrawn from savings account No. 3941. Account No. 16 of Terry Olender Gamborg shows a deposit on Janu-

ary 4th or 6th of $2000 and that this money came out of savings account No. 3941. There were no subsequent withdrawals from account No. 126. (R. 374.)

On December 15, 1944 $1000 was withdrawn from savings account No. 3941. The tag shows "To commercial account". On December 15, 1944 $1000 was deposited in the commercial account of Mrs. J. Olender. The deposit tag shows the funds came from savings account No. 3941. (R. 375.)

On January 2, 1945 $3000 was withdrawn from savings account No. 3941. The tag indicates it was transferred to savings No. 126. On January 2, 1945 the sum of $3000 was deposited to the savings account of Terrence Olender Gamborg No. 126. (R. 376.)

Cross-examination. Referring to savings account No. 3941 there was a withdrawal of $3000 on June 29, 1944 (R. 380); a withdrawal of $3000 on January 2, 1945 (R. 381).

HERMAN B. DIETZ, called by the Government, testified in substance as follows:

I am an officer of the Security First National Bank at Fresno, California. (R. 396.) U.S. Exhibit No. 49 is the bank's ledger card of the savings account of Molly Olender, No. 5910. (R. 397.) These records show that on July 5, 1944 there was a withdrawal from this savings account of $2500. (R. 398.) I am unable to determine what happened to this withdrawal of $2500. (R. 399.)

MELBOURNE C. WHITESIDE, called by the Government, testified in substance as follows:

irect Examination. I am a Special Agent of the In-
al Revenue Service. On October 18, 1948 I had a
versation with Olender in the presence of Monroe
edman and Mr. Root. I asked Olender to furnish us
rmation concerning additional assets in the form of
sonal effects, jewelry and furs which were not included
he net worth statement which he had submitted. (R.
) I also asked about his wife's savings account in the
k of America in Oakland. He stated at that time that
)0 of the deposits in that account had come from his
her-in-law who had since passed away: that he had
that money and had deposited it in this account in
wife's name. The list of jewelry, furs and other per-
l items was never furnished us. (R. 404.)

Here, witness testifies as to the investigation he made
o the matters contained on Olender's net worth state-
t.) (R. 405.)

s a result of my investigation I found that the net
th statement (U.S. Exhibit 10) was not complete. The
k account of Olender's wife was not included therein
we found that the $5000 investment in the Asturias
poration had not been included. Later we found that
elry and furs in a large amount had not been included
he net worth statement. (R. 406.)

uring my investigation we followed leads which were
n to me by the defendant as to the sources of his
me and the items of his assets and liabilities. (R. 408.)
ve been present throughout this trial. I have exam-
all the documents in evidence and as a result I have
e certain computations as to the net worth increase
tax liability of the defendant. (R. 409.)

(Here, U.S. Exhibit 50 was admitted in evidence and consists of 5 pages and is the computation of Mr. Whiteside. This is set forth in full in the Appendix at p. i.) (R. 412.)[5]

(Mr. Whiteside then explained to the jury the items contained upon U.S. Exhibit 50.) (R. 412 to 442.)

Cross-examination. Referring to U.S. Exhibit 50 and the $10,000 involved in the Asturias Stock Corporation in 1946, if in fact that stock was worthless in December of 1946, there would be a capital loss allowable. (R. 449.) As the Returns are divided between husband and wife there would have been an adjustment of $2000. (R. 491.) As to the second Asturias stock transaction if it was a loss and was uncollectible by the end of 1946 there would have had to have been an adjustment made for that also in the taxpayer's favor. (R. 450.)

There are $82,000 of Treasury Bonds listed. Included in this figure for 1945 and in the itemization of bonds for 1946 there are $20,000 of bonds which Olender contends belonged to his mother. (R. 450.) I first acquired knowledge that Olender claimed that those bonds were neither his nor his wife's from the net worth statement submitted to Mr. Root which I saw in October, 1948. (R. 450.) Prior to that time I had no such knowledge. Mr. Ralph R. Read was a former Special Agent. Subsequently I found some correspondence between Mr. Read and Mr. Olender. This was either in 1948 or early in 1949. (R. 451.) I made an investigation relative to who owned those bonds. They

[5]Later the Court ruled that the figures showing cash on hand in U.S. Exhibit 50, could not be used by the prosecution or the jury. (R. 927, 943.)

re purchased on December 5, 1945 with two cashier's ecks which previously had been purchased with cash. e checks were for $10,000 and $15,000. I knew that en bonds are purchased through the bank that the nds generally are not delivered on the same day they purchased. (R. 452.)

J.S. Exhibit 35 for identification, I have seen the origi- s of those. They were attached to a letter sent in by . Olender. It may have been in 1946. (R. 453.) With erence to these $20,000 of bonds we tried to check ether there was any transfer of funds from the Fresno nk account which may have been sent to Olender for purpose of buying these bonds. The only information er than Ringo's inventory of the safe deposit box that had that these bonds belonged to Molly Olender was t which Mr. Olender submitted to us. I know that nder's mother died prior to the first trial. I didn't estigate her estate. I did not make any investigation the probate of her estate to determine whether or not se bonds were ever listed in her estate. After the last al we did check to see what was listed in the estate l the original return filed for the estate did not include se $20,000 in bonds. (R. 455.)

Stipulated that Mrs. Molly Olender died June 1st or l, 1951.) (R. 457.)

accepted from Mr. Ringo's papers the figure that nder only had $50,000 in cash at the beginning of 1945. it should develop that of these $82,000 worth of bonds ne were in fact not the property of either Olender or wife, it would reduce the total income for the year 5 by $20,000. (R. 457.) The only other investigation we

made prior to this trial as to the ownership of these bonds was to ask the bank for information of the sale and we were unable to get the transaction from the bank. (R. 459.)

I knew at the last trial that Mr. Olender was contending that he had over $70,000 in cash in his safe deposit box as of December 31, 1944. I didn't know of that before. (R. 463.) I didn't make any additional investigation as we had covered it pretty thoroughly. I heard the affidavit of former Judge Monroe Friedman read at the first trial of this case wherein Monroe Friedman stated that as late as May of 1944 he knew there was over $70,000 in that box. (R. 463.) It wasn't necessary to do anything to verify or disprove that statement as May of 1944 was not a date that was material. We wanted to know how much cash he had on hand as of December 31, 1944. We used the taxpayer's own estimate rather than Mr. Friedman's estimate as of May, 1944. (R. 464.) I didn't compute the deductions that made the difference between $50,000 and $7200 that was left. I accepted his figure of $7200. I couldn't verify the cash on hand back in 1945. Ringo testified that there were numerous entries into the safe deposit box and no record kept of the money going in or out. There would be no way of telling unless you had a transcript of all the money going into and out of the box. (R. 464.)

We had the books of Mr. Olender and the transcripts of his bank accounts. We had a great number of his checks for examination. We had the bank records to show what withdrawals had been made. We had in our possession cashier's checks payable to Goodman for $20,550. We

ew they had been purchased with cash. Some of the nds were purchased with cashier's checks (R. 466) and ose cashier's checks were purchased with cash. We had cords of the large cash transactions, some of which ran high as 5, 10 and $15,000 and we checked to see that s cash didn't come out of his bank accounts. (R. 467.) me of these expenditures were checks drawn to his per- nal drawing account. Whenever we found these ex- nditures not related to any checks on Olender's account, ender was given credit for the cash. We didn't compute e amount of cash expenditures that didn't come out of ender's bank account as we had no knowledge of how uch money would go in and out of that box. (R. 468.) e did know that he was entering his safe deposit box llowed by a transaction involving an expenditure. (R. 9.)

I have included in the nondeductible expenditures, $1000 1946 for furs. That is the figure shown on the insur- ce policy produced by Mr. Foley. There is nothing in e policy showing that those furs had been acquired in 46 other than the fact that they were added to the licy in that year. (R. 470.) We checked with a furrier Oakland, Morris Bros., relating to these furs. We asked r an invoice but we haven't one. (R. 471.)

(The stipulation lists these furs at the sum of $676.65.)

I have included a cashier's check for $7744 (U.S. Ex- bit 45) as an asset in 1945. (R. 472.)

As to the correspondence between Mr. Reed and Mr. lender I have two letters, one addressed to the Army & avy Store and the other to Mr. Olender on August 16, 946 and a reply.

(The three letters were marked as Defendant's Exhibit "D" for identification.) (R. 476.)

The two documents you now show me are the originals of the photostats now constituting U.S. Exhibit 35 and they were attached to the letter now included in Defendant's Exhibit "D" for identification. (The two original documents were then made part of Defendant's Exhibit "D" for identification and marked D-1.) (R. 478.)

I found the Estate Tax Return. It is in the inventory that was filed in the Molly Olender estate itself. (R. 479.) On page 5 of the Federal Estate Tax Return there are some notations written in pencil which read "U.S. Government Bonds 20m".

The Federal Estate Tax Return was filed with the Treasury Department on December 15, 1952 after the first trial of this case. It is signed by Terry Olender Gamborg Glick, a sister of the defendant. (R. 487.) (The Federal Estate Tax Return was introduced in evidence as U.S. Exhibit 52. (R. 489.) Under Schedule "G", transfers during decedent's life, there appears the following: "If there were any other transfers made Terry Olender Gamborg does not have a record or knowledge of them". (R. 490.)

Relative to U.S. Exhibit 52 the Federal Estate Tax Return, from the time it was filed it remained in the custody of the Government. I didn't see any amended Schedule. (R. 492.)

CASE FOR THE DEFENDANT.

MILTON OLENDER, the defendant, testified in his vn behalf in substance as follows:

I am married and have three children, Richard Rayond Busbee, aged 40 is my stepson, James Olender aged and Audrey Nair, aged 27, my married daughter.

During the years 1944, '45 and '46 I ran the Army and avy store in Oakland where I carried mostly military uipment, uniforms, etc. During those years the sources income from which I would receive any money at all ere the Army and Navy store receipts, my partnership operty in Fresno, interest on stocks and bonds, gifts I ight receive or money that might be entrusted to my re. (R. 550.) During those three years any expenditures made would come from the following sources: From y Army & Navy store bank account or my personal nk account or from my safe deposit box or from my fe in the store or from the sale of any personal propty such as furniture. (R. 551.) The Fresno partnership nsisted of my interest in real property located in Fresno d there were five partners. (R. 551.)

In 1944 and 1945 sailor suits for sale in my store were ry difficult to get. I was the sole owner of the Army & avy store. My mother's name was Molly Olender or rs. J. Olender and my father's name was Julius Olender. y mother died in June, 1951 and her estate was probated the Superior Court in Fresno County. My sister Terrys lender Gamborg and I were the executors of my mother's tate. (R. 552.) My mother-in-law was named Laura ane Foote. She died in August, 1945. (R. 553.)

During 1944 I took care of all of the affairs that my mother and I were jointly interested in. There was a safe deposit box in the Bank of America, Oakland in my mother's name and my name that was used to deposit the documents and papers relating to these joint affairs. The box number was 44. (R. 553.) In 1944 my mother brought some money up with her and asked me to put it in that box. I believe it was $10,000. My mother resided in Fresno and she came to Oakland very often. She brought the money up in currency. Either at the end of 1944 or early in 1945 she brought up another $10,000 making $20,000 in the safe deposit box. (R. 554.) Defendant's Exhibit D-1 is a receipt I received from the Bank of America for the purchase of $25,000 of 2¼ 59-62 bearer bonds. It is dated December 5, 1945. $20,000 of that money was my mother's and $5000 was mine. I received those bonds and put them in one of the two safe deposit boxes. (R. 555.) I put $5000 of the bonds in my own safe deposit box and the other $20,000 I placed in an envelope on which I wrote "The property of Mrs. J. Olender" and the numbers of each of the bonds. On May 5, 1948 Mr. Ringo went to the safe deposit box and that envelope was in the box with the bonds in it. (Defendant's Exhibit D-1 admitted in evidence.) (R. 556.) I paid for those bonds by check. I believe I bought two cashier's checks totalling $25,000 and presented them to the person who gave me this receipt. I bought the cashier's checks with cash out of my safe deposit box. $5000 of it was mine, the other $20,000 was my mother's. (R. 557.) The documents you hand (Defendant's Exhibit "D" for identification) are the communications and queries from the Government and my reply thereto relative to the purchase

these bonds. (Documents admitted in evidence.) (R. 8.)

The first of these documents is dated August 16, 1946 the letterhead of the Treasury Department signed by alph R. Read and addressed to defendant. It asks for explanation of a currency transaction in the amount $25,000 on November 9, 1945 and also one for $25,000 November 20, 1945. The second letter in the Exhibit in the same form; is addressed to the Army & Navy ore signed by Ralph R. Read and asked for the explana- on of a currency transaction involving $25,000 on or out December 5, 1945. These letters are set forth in full the record at pages 559 and 560. The third letter is ted August 23, 1946 written by Milton Olender to Ralph Read in response to the two foregoing letters. It is set rth in full in the record from pages 560 to 562 and ates in part as follows:

> "The $25,000 transaction on December 5th, 1945, represents the purchase of U.S. Treasury Bonds as per inclosed receipt. The bonds were purchased for the account of my morther, Mrs. Olender, a resident of Fresno, California, in the amount of $20,000 on written instructions from her, which I have in my records. This cash was taken out of our joint safe deposit box and was part of the proceeds of the estate left to my mother by my father, which is of record. My records, which substantiate the above information, are available for your inspection."

The authority for the purchase of $20,000 worth of onds for my mother I received in a letter from my nother dated November 23, 1945 (Defendant's Exhibit N" (R. 563)) and reads in part as follows:

> "If you have no further need of the cash in the box, I prefer that you put it into government bonds and not into stocks, as you know only too well Dad's experience with stocks. If you do buy the bonds, put them in our box for safe keeping."

Following the purchase of these bonds I advised my mother thereof and received an acknowledgment from my mother dated December 14, 1945. (Defendant's Exhibit "O".) (R. 565.) This letter reads in part as follows:

> "I have been forgetting to mention those bonds you bought for me last week. When you get them, keep them up there for me; as I wrote you previously before, I still prefer that you put your money into government bonds instead of stocks. I realize the Bank of America dividends are higher and what you say about them is true. When you make your next payment to me, I may let you convince me, but I still think the bonds are the safest investment."

I kept those $20,000 worth of bonds of my mother's until they were sold in 1953. (R. 565.) The bonds were sold by the Bank of America on my order and as a result I received this check (Defendant's Exhibit "I"), payable to the estate of Molly Olender for $18,959.40. It is endorsed for deposit only, estate of Molly Olender by Terrys Olender Gamborg, Milton Howard Olender, co-ex. The check was deposited in the Bank of America, Fresno, in the account of the estate of Molly Olender. (R. 565-6.)

(There was then admitted in evidence as Defendant's Exhibit "P" Supplementary Inventory filed in the estate of Molly Olender on March 30, 1953 by Milton Olender. On p. 3 thereof it lists as assets of the estate $20,000

orth of U.S. bearer bonds numbered 906F, 907H, 908V
id 909K, each in the principal sum of $5000.) (R. 567.)

The bonds purchased for my mother were coupon bear-
g bonds, interest payable semi-annually. I clipped the
upons and usually deposited the proceeds in my per-
nal account and thereafter I either gave my mother the
sh but generally I mailed her a check for her share of
e dividends. The coupons represented $225 interest
miannually. (R. 568.)

In 1947 my mother gave me the interest on her bonds
id I reported it in my 1947 income tax. In the other
ears 1946, '48, '49, '50 and '51 that income was reported
my mother's income tax returns. (R. 569.)

In April, 1944 I went to San Antonio, Texas. My son
as an aviation cadet there and I learned of an Army
id Navy store there where the owner wanted to sell the
erchandise. My wife and my daughter Sue accompanied
e. (R. 569.) Before going to San Antonio I called on
onroe Friedman, a lawyer. My personal safe deposit
ox then was No. 56. I told Judge Friedman that I was
oing to San Antonio and asked him if he would go to
e safe deposit box with me and if I needed any money
hile I was gone for him to go down and draw it out and
ay a check and mail it to me. I figured if I bought this
ore I wouldn't have enough money with me. Mr. Fried-
an agreed to go with me and he met me at the safe
eposit box. (R. 570.) This was two or three days before
left for Texas. It was the day Judge Friedman was
ut on the box as a co-tenant and my wife's name taken
f. When we went to the safe deposit I opened the box in
ont of him, took out the money and counted it before

him, put it back in the box, closed the box and we went out and he signed on the box with me. At the time I counted this money in the presence of Judge Friedman I knew there was $75,000 in cash, mostly in $100 bills. Just before going to the safe deposit with Judge Friedman I had taken some money out of the box for this possible purchase in San Antonio. (R. 571.) It was 5 or $10,000. When I got to San Antonio the store had already been sold and I didn't use any of the money I took with me to San Antonio. On my return to Oakland I again saw Judge Friedman and we again went to the safe deposit box, at which time Judge Friedman's name was taken off the record as a tenant of box 56. The money was again counted and the sum remained the same. (R. 572.) The money I took to San Antonio I put back in the safe deposit box a day or two after Judge Friedman and I were there. I have known Monroe Friedman since 1914. He had acted as my attorney on many occasions and I had supreme confidence in his honesty and integrity. (R. 573.)

In 1944 I received money from my mother as gifts. I don't recall the dates now. I think there were three occasions in 1944 when I received $1000, then $2000 or $3000. (R. 573.) I can't remember the dates now but I gave Mr. Ringo information as to these gifts which was included in the net worth statement filed with the Government. Looking at the net worth statement, U.S. Exhibit 10, it refreshes my memory as to the dates. In 1945 I received the following gift from my mother: $3000 in January. In 1944 I received three gifts, one for $2000; one in July for $2500; one in December of $1000. (R. 574-5.) I didn't deposit any of these gifts in my bank accounts. I put the money in my safe deposit box. (R. 582.)

At the time I purchased the cashier's checks payable to George Goodman (Exhibit 6) I didn't know him and don't remember of having any business dealings with him prior to January, 1944. I took the money to purchase these $20,550 worth of checks out of my safe deposit box. (R. 583.)

On U.S. Exhibit 36 for identification it shows that the bank balance of the Army and Navy Store on January 4, 1944 was $1183 and on January 9, 1944 was $5600 and on January 22nd was $4900. (R. 583.)

U.S. Exhibit 37 shows that my personal account with the Bank of America had a balance on January 1, 1944 of $4041 and on January 22nd of $181. (R. 584.)

For the $20,550 checks issued to George Goodman I received 822 sailor suits. I didn't carry on any negotiations with George Goodman in procuring these suits. I dealt with Louis Levy, owner of the Western Military Supply Co. with whom I had done business. (R. 585.) After these checks payable to George Goodman were issued I gave them to Mr. Levy. Levy told me he thought that he could buy some sailor suits for me on his trip to New York. (R. 586.) Levy asked me to make out checks in various amounts. The first time he asked for three checks and when he got to New York he wrote to me and asked me to mail him additional checks. He figured he would be able to buy the sailor suits in lots of 100 at $22.50 and $23.50. That is why the checks were made out that way. (R. 587.) Levy asked me to have the checks made out to George Goodman. I distinctly told Levy that I wanted sailor suits in sizes 34 to 37 and nothing larger as large sizes couldn't be sold. I had no way of cutting down

large size sailor suits to small sizes. The most popular size was small ones. (R. 588.) After Levy went to New York I received sailor suits from the Seagoing Uniform Co. As soon as I opened up the suits they were mismarked. A 34 was as big as a 38. A 35 was what a 39 should be. (R. 589.) I complained to Mr. Levy when he came back in February or March. I made no complaint to George Goodman as I had nothing to do with him. Levy was the one I bought the merchandise from. (R. 590.) Levy said he could do nothing about it; that he had bought the suits and the sale was final. Levy said he'd see if he could sell some of them for me. I put the suits in my basement where they remained over a year. In 1945 Levy found someone who wanted to buy 200 suits (R. 591), for which I received two cashier's checks from Mr. Levy at $2500 each. Exhibits "J" and "K" are the two cashier's checks made out to L. Levy for $2500 each. They are endorsed first by L. Levy and then by me for the Army and Navy Store. They were deposited in the bank account of the Army and Navy Store and entered in the books as capital investment. (R. 592.) I didn't put any entry in the books of the Army and Navy Store of this expenditure of $20,550 (R. 593), because the transaction was uncertain. I couldn't use the merchandise and nothing had been done with it. The cash to buy these suits had come out of my personal funds to start with and when I got the $5000 back I entered it on my books as a capital contribution. Levy didn't tell me to whom he sold the 200 suits. (R. 594.) Later in 1945 Levy sold 280 more of these suits for $7000. (R. 595.) Levy said he was going to New York again and thought he could get me

ome more sailor suits and he retained this $7000 and ook it to New York with him. In 1945 I disposed of bout 20 more of the suits. The proceeds went into my ash register. (R. 596.)

When I received these 822 suits in 1944 I didn't include hem in my inventory at the end of that year. I didn't now what was going to happen to them; whether I could ell them or not. I hadn't made any entry of their purhase so I didn't make any entry in the inventory. (R. 97.) In my 1945 inventory I included 322 of these suits, nost of which were sold in 1946. (R. 597.) The 480 suits hat Levy sold for me were sold at the same price I paid or them. The $7000 Levy retained he gave to Moe Saraga, a dealer in New York. (R. 598.) About the same ime around August or September in 1945 I had a transction with Moe Saraga. I gave him a series of checks in 3600 denominations totalling $18,000 on my store acount. Then I mailed him a check for $6500 on my store ccount making a total of $24,500 plus the $7000 that Levy had given him. (R. 600.) The document you show ne (Defendant's Exhibit "R") is an invoice from M. Saraga to the Army and Navy Store.[6] (R. 601.)

U.S. Exhibit 34, cashier's check payable to the Army nd Navy Store for $7724 is endorsed Army and Navy Store by M. Olender, pay to the order of Louis Levy and ubsequently endorsed by M. Saraga. Saraga couldn't urnish the rest of the merchandise for me. He had delivered $23,725 thereof and he refunded me the difference

[6]The Saraga invoice dated July 31, 1945 shows the sale to the Army and Navy Store of 1000 suits at $25 each, total $25,000.

by that check. I gave the check back to Mr. Levy who said that Saraga could furnish me that merchandise. I received that money back by another check. (R. 603.) I never received the additional merchandise. This check for $7724 represented the $7000 that Levy first took to Saraga (R. 604) and the $724 was for the 49 undelivered sailor suits. This $7724 was first returned to me by Saraga's personal check which I put in my bank for collection as the check was postdated and it was returned to me for not sufficient funds. I redeposited it and I got a check for it which was satisfactory. (R. 605.) It may have been that the same check was put through twice for collection. The bank charged me $1.00 for the collection service which left $7724. (R. 607.)

Defendant's Exhibit "S" is my individual income tax return for the year 1944. (R. 611.)

(Here, witness testifies as to certain income from the Fresno partnership property he received during various years.) (R. 612.)

The money I received from the Fresno property I put in my safe deposit box. It didn't go into my bank account. The moneys I had in my safe deposit box during 1945 and 1946 did not remain static. I constantly put money in such as income from Fresno, interest from bonds, maybe checks that I had cashed in the store (R. 614), and very often I would take cash out of the safe deposit box and expend it (R. 615).

Defendant's Exhibit "T" for identification is two cashier's checks for $248.26 and for $1911.77 issued to Barney's Clothes Shop. They were purchased in 1944 out of money in my safe deposit box. (R. 616.)

In 1946 I gave $5000 for stock in the Asturias Corporaon and later in the year gave the corporation $5000 as loan. I have never realized anything back from these ansactions. (R. 617.) I didn't advise Mr. Ringo in 1948 this loan to the Asturias Corporation because I knew was worthless at that time and there was no purpose declaring it. It had been declared worthless by the U.S. overnment in 1947. (R. 618.)

(Defendant's Exhibit "U", a statement from the Interal Revenue Department, determining that the stock of e Asturias Import & Export Corporation and stockholds' loans were deemed to have become worthless on approximately October 1, 1947.) (R. 619.)

Defendant's Exhibit "V" are three deposit slips in the ccount of Olender and Alkus, of which account I had ntrol. I opened it up in the name of Olender and Alkus r business transactions or private bond purchases beveen Mr. Alkus and myself. In either 1942 or 1943 Alkus nd I sold around $20,000 worth of raincoats to the nited States and twelve or thirteen thousand dollars orth of gloves. I ran that transaction through this acunt and we divided the profits. The three deposits in efendant's Exhibit "V" had nothing to do with Mr. lkus. (R. 621.) After the transaction with Alkus termiated in 1943 the account was kept alive as my sole acunt. The deposits on Defendant's Exhibit "V" show a eposit in 1944 of $1500, in May, 1946 of $1700 and on ecember 18, 1946 of $2500. (R. 622.) All that money ame out of my safe deposit box. (R. 623.)

Defendant's Exhibit "W" are deposit slips representg deposits into my personal account. (R. 623.)

(The books of the Army and Navy Store were then introduced in evidence as U.S. Exhibits 12, 13, 14, 15 and 16.) (R. 624.)

(By stipulation, three books of account of Moe Saraga were introduced into evidence as Defendant's Exhibits "X", "Y" and "Z".) (R. 625.)

Defendant's Exhibit "AA" are deposit slips dated November 20, 1945 for three trustee accounts opened by me for $3000 each for my three children. (R. 625.) I took these funds from my safe deposit box in cash and deposited the cash to these three accounts. (R. 626.)

Defendant's Exhibit "AB" is a bank book of the Olender and McGrete account opened on May 1, 1946. It shows a deposit on May 1, 1946 of $5000 and on May 21, 1946 of $750.20. (R. 627.) Those deposits came from my safe deposit box. The venture with McGrete was never consummated. I had expended $750.20 and received that back. I controlled the account and it remained my property. (R. 628-9.)

Cross-examination. Referring to the expenditure of $15,833.46 for the purchase of the life insurance policy, there were two $15,000 transactions at that time. The money either came out of my safe deposit box for the life insurance or it came out of the store check for the life insurance. I paid the life insurance by cashier's check which I bought either with cash or with a check from the store. (R. 633.) When I told Mr. Ringo about the purchase of the life insurance he probably told me it would throw my net worth out of balance. At that time I asked him to take off the Asturias stock because I knew it was worthless in 1947. (R. 635.) In my mind the stock was

orthless in 1946. (R. 636.) In December of 1946 I loaned
ne Asturias Corporation $5000 and also co-signed a Note
t the bank after that date. I was a director of the cor-
oration. (R. 637.) I didn't tell Ringo about the second
5000 transaction with the Asturias Corp. It was shortly
fter that I told him of the loans from my mother. (R.
41.) I obtained the information about the loans from
ıy mother by going to Fresno and my mother checked
n the times she thought she had given those gifts and
ave me a list which I brought back to Mr. Ringo. I
idn't go to the bank and look at the records. (R. 642.)
told Ringo that those were the dates that my mother
ıought she had withdrawn money from the bank and
iven it to me. Today I have doubts as to the exact date
n which those gifts were turned over to me. (R. 643.)
Iy mother never to my recollection ever made a gift to
ıy sister that she didn't make a like gift to me. There
re not two withdrawals of exactly the same amount on
ne same date in my mother's bank account. She also
ad cash. (R. 644.) My mother from whatever place she
ad it took the same amount of cash that she transferred
ıto my sister's account and gave it to me. (R. 645.)

(Defendant's Exhibit "Q" for identification offered in
vidence by the Government. It is a letter from Olender's
ıother to Olender dated July 11, 1944 and reads as fol-
ows:

> "Milton dear: As I told you over the phone, I have $7,500 in safe and will get a cashier's check for $2,500 and bring it down with me when I come, which will be on July 21st on Santa Fe Streamliner, which leaves Fresno at 1:00 p.m. If you think it best, I can leave cash where it is 'til you want me to bring it.

I am leaving that all up to you. Just drop me a postal saying, 'Bring package,' if you want it and 'Don't bring package,' if you don't want it. Destroy this letter after reading.'' And then some reference to the weather.) (R. 647.)

The letter refers to part of the cash which she brought up for the bonds and the $2500 gift which she was bringing. She came up on July 21st and brought with her $7500 and $2500 in a cashier's check. (R. 648.) The $2500 was a gift to me. (R. 649.) I originally didn't tell Ringo about the gifts from my mother as I didn't want to involve her in my net worth statement. She was very ill at the time. (R. 654.)

U.S. Exhibit 56 is the savings account of my wife, Betty Olender with the Bank of America. (R. 691.)

U.S. Exhibit 57 is an application for a cashier's check and a cashier's check which was ultimately deposited in my wife's savings account on June 7, 1946. (R. 692.)

Exhibit 46 shows a deposit of $5000 on December 20, 1945. It came from a check on my store account. On June 7, 1946 is a $3000 deposit which is related to the $3000 cashier's check, U.S. Exhibit 57. I had received 5000 odd dollars as a result of the sale of my home in Fresno. (R. 693.)

On October 18, 1948 I had a conversation with former Judge Friedman, Mr. Root and Mr. Whiteside at which time I told them I had received some money from my mother-in-law, Mrs. Laura Jane Foote. (R. 694.) I told them that when Mrs. Foote died in 1945 I put $3000 in my wife's savings account that I had received from Mrs.

'oote. (R. 695.) After Mrs. Foote got off the old age ension system she gave me the $3000 which she had cquired partly from me and partly from her daughter nd her son, partly from the sale of birds and dogs and lankets that she crocheted and many other ways. She rned it over to me in 1945 in currency, for me to hold or her grandson. (R. 696.)

I had that money in the safe deposit box since 1942 at hich time there was at least $75,000 which I received rom my father in Fresno. (R. 700.) I didn't use any of ie money I put in my safe deposit box during 1942. It as all on hand at the end of the year. I don't remember sing any of it in 1943. In 1944 I took out the $20,550 or the sailor suit transaction and at the end of 1944 I ook out 2 or $3000 which I paid to Barney's in Los ngeles. (R. 712.) At the end of 1944 there was over 70,000 in my safe deposit box. At the end of 1945 I on't remember how much cash there was in the safe eposit box. (R. 715.) At the end of 1946 there was no oney in the safe deposit box. (R. 716.) There was con-derable money in my safe deposit box at the end of 946 but I can't approximate it. It wasn't in the thou-nds. (R. 724.)

When I gave Levy the checks payable to Goodman, evy didn't know whether he was going to be able to get ie 100 suits or 300 suits. He asked me to give him the hecks. He asked me for a series of checks. (R. 747.) can't remember whether Mr. Levy was in New York but e may have phoned, wired or written me and in some ay he communicated with me and asked me to send iese additional checks. (R. 747.) Levy told me to make

the cashier's checks payable to the order of Goodman. (R. 748.) I received some of the Goodman suits in January, February and some in March and there could have been some a month or two later. They came in different lots. (R. 750.) I put the Goodman suits in my basement because of the sizes. I have two basements which I call basement No. 1 and basement No. 2. I put the suits in basement No. 1. (R. 753.) I took the store inventory at the end of 1944 and 1945. (R. 754.) I sold none of the Goodman suits during 1944. (R. 757.) I had one other transaction with Goodman in 1944 for $1380. I did not buy any other suits from Goodman in 1945 or 1946. (R. 758.)

U.S. Exhibits 60, 61 and 62 are my merchandise inventories for the end of 1944, 1946 and 1947. (R. 759.)

U.S. Exhibit 52, the sales agency invoice which went from Mr. Levy to Mr. Lerman, I had nothing to do with the preparation of that invoice and didn't tell Levy what sizes to put thereon. I didn't know those suits were being sold to Mr. Lerman. The size markings on the suits were incorrect. (R. 769.)

U.S. Exhibit 63 is a document prepared by Mr. Hellman during the course of the last trial and reflects so far as my books and records show, the purchases I made of Navy uniforms during 1944, 1945 and 1946. (R. 783.)

U.S. Exhibit 74 are railway receipts reflecting the receipt of cartons from George Goodman. (R. 788.) These express receipts show my receipt of cartons from George Goodman on the following dates: January 14th, 15th, 21st and 26th, February 14th, 18th and 25th, 1944. (R. 791-2.)

With reference to U.S. Exhibit 34, the check for $7724, e origin of that money was the sale of some 280 suits nich Levy made out of the 822 I had on hand from oodman. (R. 795.) Goodman never turned that money er to me; he took it to Mr. Saraga. (R. 795.) I eventu-y received back from Saraga $7724 representing $7000 a refund on a portion of orders Saraga was unable fill and $724 as a refund on 49 suits. (R. 796.) Out the 7000 Saraga kept $500 to complete the billing for 5,000 worth of suits leaving $6500 plus the refund on suits at $25 making $1225 or a total of $7725 less $1.00 arged by the bank for collection, leaving $7724 which I posited to my personal account. (R. 797.)

Redirect Examination. Defendant's Exhibit "AD" is e merchandise inventory of the Army & Navy Store r January 1, 1944 and shows at that time I had 346 ilor suits on hand. (R. 801-2.)

U.S. Exhibit 56, the savings account of my wife, shows e withdrawal of $2500 on May 12, 1947. (R. 803.)

Defendant's Exhibit "AE" is a deposit slip showing at on May 12, 1947 there was deposited to the account my wife's son R. R. Busbee, $2500. (R. 803.) Prior to rs. Foote coming to my home before her death she had en living in Fresno. She died in August of 1945. (R. 05.) She told me she had this money and she wanted e to keep it for her and when Richard came out of the arine Corps she wanted that used for a down payment n his home. She gave me the money and I think I put in my safe deposit box. I transferred the equivalent of to my wife's bank account in December of 1945 by rawing a check on my store account for $5000 and started

my wife's bank account with it. (R. 806.) I told my wife that $2500 of the money was what Mrs. Foote had given me for Dick. (R. 807.)

In December of 1946 I came to the conclusion that the stock in the Asturias Corp. was worthless. In December of 1946 I loaned that company $5000. I did so to try to save the company. (R. 807.)

My sister Terry Olender Gamborg and I were co-executors of my mother's estate. We were on very unfriendly terms. (R. 814.)

Defendant's Exhibit "AK" is the savings passbook of Molly Olender in the Securities First National Bank, Fresno Branch, No. 59810 and shows a withdrawal of $2500 on July 5, 1944. (R. 829.)

Questions by the Court. At the beginning of 1945 I had between $70,000 and $75,000 in my safe deposit box. At the end of 1945 I cannot approximate how much cash I had in the safe deposit box. (R. 847.)

MONROE FRIEDMAN, testified in substance as follows:

I have been an attorney-at-law since 1920 with the exception of about 13 months during which I was United States District Judge for the Northern District of California. I have known the defendant about forty years and have acted as his attorney. In April, 1944 I had a transaction with Olender that culminated in my visiting a safe deposit box in Oakland. (R. 498.) He came to see me at my office and stated that he and his family were going to Texas later that month; that he had a son in the Armed Services who was stationed in Texas; that he would be

ne a few weeks or a few months and while there he was
ing to look around to see if he could open up some
re down there; that while he was gone he would like
have someone in Oakland who he could trust who
uld have access to his safe deposit box. He asked me
put my name on the safe deposit box during the period
his absence so I would be able to do whatever he di-
ted me to do without his coming back to Oakland and
said I would. (R. 499.) A couple of weeks later he
led up and said he was leaving for Texas and would I
et him at the Bank of America, 12th & Broadway, be-
ıse he wanted my name to go on his box. We both
nt to the bank together and we both went in. When
came out the clerk there presented a card. I believe
box had been in the name of Olender and his wife and
ne cards were presented so that it would then be in the
me of Mr. Olender and myself and he gave me the
. (R. 500.)

Defendant's Exhibit "F" dated April 22, 1944 contains
signature. (R. 501.)

(Exhibit "F" is the record of the Bank of America in
kland and refers to safe deposit box 56 and contains
signatures of Olender, Milton and Friedman, Monroe.)

On May 5, 1944 the box was surrendered and trans-
red to a single card. (R. 501.) On April 22nd Olender
his safe deposit box; we sat down; Olender opened
box and I saw currency in it. Olender counted the
rrency in my presence. (R. 502.) There was over
0,000, two or three hundred dollars more than $70,000.
May 5th, 1944 I met Olender at the bank. My name
nt off the box and I gave him back the key. From

April 22nd to May 5th, 1944 I hadn't entered the box at any time. (R. 503.)

The document shown me is a duplicate original containing my signature that was sworn to on September 13, 1948. Olender came to me in 1948, stated the Internal Revenue Department was asking him some questions and he discussed with me as to the fact that this money was in his box four years before and asked if I would make a statement concerning what I personally knew so I drew up this statement (affidavit) as to what was my recollection in 1948 as to what had happened four years before. (R. 504.)

(The affidavit testified to by the witness was marked Defendant's Exhibit "G" for identification and subsequently admitted in evidence. (R. 881.)

Cross-examination. In April of 1944 I was representing Mr. Olender as his lawyer in general matters. The currency in the safe deposit box was mostly in $100 bills. I would say we were there from 10 to 15 minutes. Olender counted out the currency. (R. 507.) There were bonds in the safe deposit box and some papers which I didn't examine. I probably gave Olender some kind of a memorandum but I don't recall it. I didn't make any other memorandum as to the contents of the box. (R. 508.) I think some memorandum was made about the money. I think there was a memorandum that was initialed or signed. I don't recall it exactly. On May 5th the money wasn't counted again. (R. 509.) In 1948 Olender told me where the money in the safe deposit had come from. (R. 512.) In 1948 I drew up his affidavit and the affidavit of his mother who has since died. In 1948 I think there were

some affidavits in connection with the Goodman checks. (R. 513.) Olender's mother furnished me with the information which was included in the affidavit I prepared for her. She came to my office. (R. 514.)

C. F. CARROLL testified in substance as follows:

I am identified with the Bank of America in Oakland, California. I have brought records of the bank showing the sale of bonds for the estate of Molly Olender in July, 1953. The first document is the order to sell. It is signed for the estate of Molly Olender by Milton Olender. (Defendant's Exhibit "H".) (R. 517).

(Exhibit "H", the order to sell the securities, was dated July 13, 1953 and lists the securities as 4 $5000 TB 2¼% bonds numbered 906F, 907H, 908J and 909K.) (R. 518.)

Pursuant to the order the bonds were sold and a cashier's check was issued by the bank. (Defendant's Exhibit "I", is check payable to the order of estate of Molly Olender for $18,959.40 and is endorsed "for deposit only, estate of Molly Olender by Harry (sic) Olender Gamborg, Milton Olender, co-ex.) (R. 520.)

MORRIS LERMAN testified in substance as follows:

In 1945 I was engaged in operating an Army-Navy store at 915 Broadway, Oakland. In 1944 I knew Mr. Louis Levie who was in the wholesale supply of military articles. (R. 524.) In 1945 I had two transactions with Louis Levie involving the purchase of sailor suits. Each transaction amounted to $2500 and 100 suits were in each transaction. (R. 525.) I paid Mr. Levie with cashier's checks which I purchased from the American Trust at

14th and Broadway. (The two checks and registers admitted in evidence as Defendant's Exhibits "J", "K", "L" and "M".) (R. 526.) I received the sailor suits as a result of the transaction with Mr. Levie. The suits were mismarked as to size. (R. 527.) They were not truly marked. A 38 was a 42. During the war the most popular sizes of sailor suits were 34, 35, 36, 37 and some 38's, very few 40's or 42's. During 1945 I had three tailors in my establishment for the purpose of making alterations. (R. 528.) I did not know where these 200 sailor suits came from.

(Defendant's Exhibits "J" and "K" are two cashier's checks, one dated May 14, 1945 and one May 15, 1945, each payable to the order of L. Levie for $2500 and each endorsed L. Levie and M. Olender.) (R. 529.)

(Defendant's Exhibits "L" and "M" are registers of the bank as to the issuance of the two cashier's checks showing the purchase by Lerman Co. Inc., and that each check was paid on June 20, 1945.) (R. 530.)

Cross-examination. In this transaction I bought 200 suits from Mr. Levie. I picked them up myself at Mr. Levie's office. (R. 532.) I had asked Mr. Levie several times to send us surplus merchandise of suits. He called me one day to secure a check and bring it over and I could have the suits. (R. 534.) When I found the sailor suits were smaller (sic) than the sizes I had the greatest call for, I think I notified Mr. Levie. The invoices you show me I got in connection with the purchase (R. 537) of the 200 sailor suits from Mr. Levie. Those are the only sailor suits I ever purchased from Mr. Levie. (R. 538.)

Redirect examination. When I complained to Mr. Levie about the size markings in the suits he said he wasn't the manufacturer and that he didn't know anything about the markings. (R. 545.)

LEWIS LEAVY testified in substance as follows:

In 1944 and 1945 I was a wholesale distributor of military supplies. We were not handling uniforms. I handled uniforms only as a side line and not as part of my business. (R. 849.) I have known Milton Olender since 1942. He has been a customer of mine through the years.

At the end of 1943 or beginning of 1944 I purchased for Olender about $20,000 worth of sailor suits from George Goodman in New York. (R. 850.) Some time after I returned from New York Olender called me and told me that the suits that Goodman sold him were improperly marked and the sizes were not correct; that he was having trouble. After Olender complained to me I wrote to Goodman regarding the sizes and never got a reply from him. (R. 851.) Subsequently I sold 200 of those suits to Mr. Lerman at $25 each and gave the proceeds to Mr. Olender. Subsequently I sold about $7000 worth of the suits for Olender. I didn't tell Olender I sold the suits to Mr. Lerman or Mr. Lerman for whom I was selling the suits. (R. 852.)

In 1944, Mr. Lerman asked me if I could get some suits for him. I spoke to Olender and told him that I could sell some suits to Lerman and Olender said he didn't want to sell them to his competitor. On the second disposition of these suits for $7000 I took this money to New York and contacted Mr. Saraga and turned the $7000 over to him, for which I purchased some small sizes for Olender.

This was the result of an understanding between me and Olender when I took the money to New York. (R. 853.) Later Saraga returned the $7000 to me because he couldn't deliver any of the suits. He returned it by check payable to the Army & Navy Store and this check bounced. Some time after he sent a check made out to me which I turned over to Olender. While I was in New York I bought some suits a couple of days before from Saraga for Olender in the amount of $18,000. Olender sent that money to me while I was in New York and I turned it over to Saraga. The $18,000 was in addition to the $7000. (R. 855.)

Cross-examination. Before I left for New York in 1943 or 1944 Olender asked me whether I could locate sailor suits for him. (R. 856.) When I went to New York I didn't know I was going to purchase the suits from Goodman. I did not take the cashier's checks with me that were purchased by Olender to the order of Goodman. I didn't know Goodman at the time. It was while I was in New York that I arranged the deal with Goodman and I either telephoned or wrote to Olender about it. (R. 857.) The reason that Goodman's name appears on the cashier's checks is that I must have taken it up with Olender that I made a deal for him and to send the money. I don't remember why the checks were made out in the particular amounts. (R. 858.) In all probability subsequent to the purchase of the first series of sailor suits with the first three checks I arranged to purchase additional sailor suits and I must have communicated that information to Mr. Olender and to send forward some more cashier's checks and to put Goodman's name on them. (R. 859.)

I don't remember how long after the suits were deliv-
ed to Olender that Olender called me about the mis-
arkings. I immediately communicated with Goodman.
have no copy of the letter. (R. 862.) I never received a
ply from Goodman. I took the matter up with Goodman
gain when I was in New York and he said he would
ake good; that he would send me some small sizes. I
lieve he shipped Olender a small lot of small sizes. (R.
3.)

Olender started pestering me to get rid of those suits
d Mr. Lerman came over one day and I told him I
ought I could get a few suits for him, a couple of hun-
ed. He said he would take them at $25 a piece. I got
old of Olender and told him I could sell 200 suits. (R.
4.) I didn't tell him to whom. Olender delivered the
its to my place of business and Lerman picked them
there. (R. 865.) Lerman gave me two cashier's checks
r $2500 each and I endorsed those over to Olender.
. 866.)

I received complaints from other customers concerning
zes of the suits which I was handling. The customers
mplaining were the ones that had no tailors to fix suits.
. 870.)

At the time I made the transfer of the suits from Olen-
r to Lerman I made out an invoice. U.S. Exhibit 33
as done in my office. (R. 870.) At the time I sold those
its to Lerman I knew I wasn't shipping him the proper
zes but I knew he had tailors that could fix them. I didn't
ll Lerman the suits weren't properly marked. Lerman
mplained to me that they were not properly marked

soon after he got them. He said the sizes didn't correspond with the tickets. (R. 871.)

The remainder of the suits that I sold for Olender for $7000 I collected the money in checks and kept them until my next trip to New York. When I went to New York I either got a cashier's check or took all the checks. I don't remember which and gave them to Saraga. (R. 875.) The sale of the $7000 worth of suits covered quite a period of time. I don't remember just what I did with the checks I got for those suits but I didn't give them to Olender. (R. 876.) I don't remember the names of the customers to whom I sold the $7000 worth. They were not all sold to one person. They were all Army and Navy stores. (R. 877.)

(It was here stipulated that Defendant's Exhibit "G" for identification be admitted in evidence and that the same was a carbon copy of the Monroe Friedman affidavit attached to Olender's net worth statement of September 13, 1948.) (R. 881-2.)[7]

GOVERNMENT'S REBUTTAL.

In rebuttal the Government called John Sanchirico of Brooklyn, New York, Executive Vice President of the Seagoing Uniform Corporation. This witness testified over the objection of appellant and the substance of his testimony and of the Exhibits introduced during his testi-

[7]The affidavit of Monroe Friedman made in 1948 is substantially the same as his testimony at the present trial.

nony, is set forth hereafter in Specification of Error No. VI.

COURT'S INSTRUCTIONS.

The Court instructed the jury in part as follows:

> "In many net worth cases the government relies on the taxpayer's statements made during the course of a governmental investigation in order to establish vital links in the government's case. Sometimes these statements are made by a taxpayer more concerned with a quick settlement than an honest search for the truth. In order to safeguard the defendant, the law requires that these statements relating to vital links in the government's case be corroborated. In this connection, the $50,000 cash item and the $7200 cash item used by the government in Exhibit 50 cannot be considered by you in determining the opening or closing net worth, because the government did not corroborate that. You can use, however, whatever amounts the defendant said he had while he was on the witness stand here under oath." (R. 927.)

After the jury was instructed the prosecutor took an exception to the foregoing instruction of the Court and appellant's attorney called the Court's attention to what he considered a conflict in the instructions. (R. 942-3.) Whereupon the Court called the jury back and instructed them as follows:

> "The Court. It has been called to my attention, ladies and gentlemen, that perhaps there is some confusion from a statement I made. I asked you not to draw any inference against either side because of rulings that I made throughout the trial. I was re-

ferring to the rulings I made with regard to the admission or exclusion of evidence. I didn't mean that you should disregard any statement to you that you cannot consider the $50,000 or the $7,200 item in that Exhibit 50. I mean that you cannot consider it. So don't disregard that ruling. The rulings that I had reference to were the rulings made throughout the trial during the ordinary objections by the government or by defendant's counsel to rulings on evidence." (R. 943.)

At the conclusion of all the evidence in the case appellant moved the Court for a judgment of acquittal on each count of the indictment (R. 915), which motion was denied by the Court.

A motion for new trial (R. 18) was made and denied. (R. 20.)

SPECIFICATION OF ERRORS.

I. THE COURT ERRED IN DENYING APPELLANT'S MOTION FOR JUDGMENTS OF ACQUITTAL MADE AT THE CONCLUSION OF ALL THE EVIDENCE IN THE CASE.

At the conclusion of all the evidence in the case appellant made the following motion for judgments of acquittal as to each count of the indictment, which motion was denied by the Court:

"Mr. Friedman. If the Court please, at the conclusion of all the testimony in the case, both sides having rested, I desire to move the Court for certain judgments of acquittal. And while the motions in part have not been segregated, I would like them to apply to each of the counts in the indictment. In other words, I don't want to repeat it four times.

Defendant moves for judgment of acquittal on counts 1, 2, 3 and 4 of the indictment on each of the following grounds:

A. That the evidence is insufficient to establish the charge contained in each of the four counts of the indictment.

B. That, absent the net worth statement of the defendant, which is Exhibit 10 in this case, and alleged admissions of the defendant as testified to by the revenue agents in the case, Mr. Root, Mr. Whiteside and/or Mr. Blanchard, there is no independent proof of tax evasion as to each year involved in the indictment.

C. That there is no corroboration of the extrajudicial admissions of the defendant.

D. That the opening net worth of defendant as of December 31, 1944 has not been established to a reasonable certainty. And may I interpose: In my motion when I say 'defendant' I am referring, of course, to the defendant and his wife.

E. That the closing net worth as of December 31, '45 and the opening net worth for the year 1946 has not been established to a reasonable certainty.

F. That the closing net worth as of December 31, 1946 has not been established to a reasonable certainty.

G. That the government has failed to follow leads supplied by the defendant as to whether defendant's mother owned $20,000 worth of bonds included in the stipulation as part of the $82,000 of bonds in defendant's possession at the end of 1945, and has failed to follow leads as to the amount of cash money in defendant's possession on December 31, 1944.

H. That the government has failed to credit defendant's opening net worth on December 31, 1944

with $7,724 in cash or assets which produced the claimed assets of $7,724 which is Exhibit 34 in evidence in the year 1945.

I. That as to cash expenditures of defendant during 1945 and 1946, the government has failed to establish and the evidence fails to establish any source of income other than the Army and Navy Store, defendant's Fresno property, interest on stocks and bonds or gifts or trustee funds received by defendant, and has failed to establish that any such cash expenditures in 1945 and 1946 were not from funds or property owned by defendant prior to December 31, 1944." (R. 915.)

II. THE EVIDENCE WAS INSUFFICIENT TO SUPPORT THE VERDICT OF GUILTY ON COUNT 1 OF THE INDICTMENT.

III. THE EVIDENCE WAS INSUFFICIENT TO SUPPORT THE VERDICT OF GUILTY ON COUNT 2 OF THE INDICTMENT.

IV. THE EVIDENCE WAS INSUFFICIENT TO SUPPORT THE VERDICT OF GUILTY ON COUNT 3 OF THE INDICTMENT.

V. THE EVIDENCE WAS INSUFFICIENT TO SUPPORT THE VERDICT OF GUILTY ON COUNT 4 OF THE INDICTMENT.

VI. THE COURT ERRED IN ADMITTING IN EVIDENCE, OVER APPELLANT'S OBJECTION, THE REBUTTAL TESTIMONY OF JOHN SANCHIRICO AND U.S. EXHIBITS 66 TO 71 INCLUSIVE.

In rebuttal the Government called as a witness John Sanchirico who testified from records of the Seagoing Uniform Corporation, to certain transactions between said corporation and George Goodman in 1944, resulting in certain claimed shipments of sailor uniforms to appellant. Certain invoices and shipping memoranda (U.S. Exhibits 61 to 71) were introduced in evidence. All over the objection of appellant.

As the witness' testimony and said Exhibits are quite lengthy, we set forth the same in the Appendix hereto at page v together with the objections of appellant.

ARGUMENT.

The first point relied upon by appellant is the insufficiency of the evidence to establish to any degree of certainty any opening or closing net worth, resulting in a failure of proof as to each of the four counts of the indictment.

As counts 1 and 2 relate to the reporting of income for the year 1945 and counts 3 and 4 relate to the year 1946, said separate returns of husband and wife being made on a community property basis, we will discuss counts 1 and 2 under the same heading and counts 3 and 4 under one heading.

I. THE EVIDENCE WAS INSUFFICIENT TO ESTABLISH THE OFFENSES SET FORTH IN COUNTS 1 AND 2 OF THE INDICTMENT. (Specification of Errors Nos. I, II and III.)

The failure of the Government to establish to a reasonable certainty appellant's net worth as of December 31, 1944 and December 31, 1945 constitutes a failure of proof as to counts 1 and 2 of the indictment. (*Holland v. United States,* 348 U.S. 121; 99 L. ed. 150.)

Appellant contends that the Government either failed to establish the opening and closing net worths, or that the evidence established such opening and closing net worths as to result in no understatement of taxable income.

In these regards we contend (1) that there was a substantial and undetermined amount of cash on hand on the opening net worth date or that it must be considered there was in excess of $70,000 in cash on said date; (2) that the Government has failed to credit in the opening net worth, the sum of $20,550 representing sailor suits on hand; (3) that the Government has erroneously included in the closing net worth the sum of more than $27,724.

(a) The cash on hand as of December 31, 1944.

The Government in computing appellant's net worth as of December 31, 1944 credited appellant with the sum of $50,000 cash in his safe deposit box. (U.S. Ex. 50, Appendix p. i.) The Court ruled that this figure could not be relied upon or considered by either the Government or the jury in determining the issues herein involved. (R. 927, 943.) Thus, so far as the Government's computations are concerned, the opening net worth erroneously failed to include any cash on hand. Although the evidence established that Olender must have had a substantial amount of cash on hand, this ruling of the trial Court left the evidence in the following situation: Either there was an undetermined substantial amount of cash or there was between $70,000 and $75,000 on hand on December 31, 1944.

The first reference to this amount is found in Olender's net worth statement submitted to the Government on September 13, 1948, prepared by the accountant Ringo. (U.S. Ex. 10.) This Exhibit credits Olender with having $75,000 cash in his vault on December 31, 1941. This Exhibit also refers to an affidavit attached to the net worth

tatement (but not introduced at the trial) as to the reation of this fund. Ringo testified that in preparing he net worth statements he brought people in and exam- ned them to confirm what Olender had told him as to the reation of this fund, as to the wealth of Olender's father nd that his father had sums available from which this und was created. (R. 160.)

In April of 1944, former Judge Monroe Friedman ccompanied Olender to his safe deposit box, at which ime, he testified at this trial, there was slightly in excess f $70,000 in Olender's safe deposit box (R. 503) and hat said amount was still in the safe deposit box on Iay 5, 1944. In 1948 Monroe Friedman executed an ffidavit which was submitted to the Government as part f the foregoing net worth statement, averring the fore- oing. This affidavit was never produced by the Govern- nent but was brought forth at the trial by appellant as Defendant's Exhibit "G".

Olender testified to the same effect as Monroe Friedman xcept that he stated there was $75,000 in $100 bills in the afe deposit box in April and May, 1944. (R. 570-1.)

Olender also testified that prior to the visit to the safe leposit box in April, 1944 he had withdrawn $5000 or 10,000 therefrom for the purpose of a business trip to Texas; that he didn't use this money and on his return nd when Monroe Friedman's name was taken off the afe deposit box, that he thereafter put this money back n the safe deposit box. The testimony of Olender and Monroe Friedman establishes that on May 5, 1944 Olender had at least $70,000 in his safe deposit box and, taking he lower figure of the money brought back from Texas,

that there was added to this at least the sum of $5000, making $75,000 in cash at the end of May, 1944.

Here it is important to note that there were no undisclosed sources of income to which could be credited any cash expenditures. Olender testified that his only sources of income were from the Army and Navy Store; his properties in Fresno; dividends and interest on stocks and bonds and gifts and that all expenditures made by him were either out of the store bank accounts, his personal bank accounts or out of cash in his safe deposit box. (R. 550, 551.)

Revenue Agent Whiteside testified that the Government had records of large cash transactions running as high as $5,000, $10,000 and $15,000 and that a check showed that this cash did not come out of appellant's bank accounts. (R. 467.)

Whiteside further testified that they found records of bonds having been purchased with cashier's checks and that the cashier's checks had been purchased with cash. (R. 466-7.)

Whiteside further testified that the Government had not made any computation or investigation to determine how much cash expenditures had been made by Olender as distinguished from expenditures by check on his various bank accounts. (R. 467-8.)

The record shows, among other cash expenditures, that in 1945 Olender opened three trustee accounts for his children in the sum of $15,000 cash. (Testimony of Olender, R. 626; Defendant's Ex. "AA"; U.S. Ex. 10 and Defendant's Ex. "D", R. 561); that $5,000 cash was expended for United States Treasury Bonds (Defendant's

Ex. "D", R. 561; U.S. Ex. 10); that $10,000 in cash was deposited to Olender's personal bank account (Defendant's Exs. "W" and "D").

The stipulation (U.S. Ex. 11) shows that at the end of 1944 appellant and his wife had $24,000 worth of United States Treasury Bonds; that at the end of 1945 this sum had been increased to $82,000, an increase of $58,000; deducting from this the $20,000 of bonds belonging to defendant's mother it leaves an increase of $38,000 for the purchase of bonds. Thus, we find large cash expenditures in 1945 far in excess of the $50,000 the Government sought to rely upon that could only have come out of the cash in Olender's safe deposit box.

Furthermore, U.S. Ex. 36, R. 583, the transcript of the bank account of the Army and Navy Store, shows that on June 30, 1945, $8000 was deposited to this account.

Thus Olender had a substantial amount of cash at the end of 1944. This was either the amount as testified to by Olender or an undetermined amount which would render the computations of the Government erroneous and the proof insufficient.

The trial Court instructed the jury that they could not use the sum of $50,000 relied on by the Government for any purpose but that they could use "whatever amounts the defendant said he had while he was on the witness stand here under oath". (R. 927.)

If Olender's testimony is believed, as it should be, then the sum of $75,000 must be credited to him in computing his opening net worth.

On all fours with the present case is the case decided in the Fifth Circuit based upon the rulings in the *Holland*

case and the companion cases decided by the Supreme Court.

In *Vloutis v. United States* (5 Cir.) 219 F. 2d 782, the Government relied on the net worth method of proof to establish income tax evasion for the years 1944 and 1945. Involved was the question of how much cash the defendant had on hand at the opening net worth period.

In discussing the value of Government computations, the Court at p. 791 stated:

> "Of course, the calculations made in these cases are only as sound as the investigation is complete, because the method *assumes* that the annual increases in net worth are attributable to taxable income received during the year. If the taxpayer had had non-taxable income (from loans, gifts, bequests or tax-free interest, for example) with which he could have acquired the assets, the premise upon which the calculations are based falls; and the calculations are meaningless. Likewise, since the prosecution is limited to the specific period charged in the indictment, the foundation of the structure collapses if the taxpayer had on hand at the beginning of the period sufficient undisclosed funds to acquire the assets listed, whatever the source of those funds. Because the prosecution is *based* upon assumptions and is proved almost entirely by circumstantial evidence, the courts must closely study the evidence to see that the Government has been fair in its presentation of the evidence and to be certain that the jury would be justified in concluding the underlying assumption sound." (Court's italics.)

The defendant had testified that he had $40,000 at the end of 1941. The Government agent testified that he had no such money.

The Court at p. 782 states the testimony of the Govern-ient agent as follows:

> "Under vigorous cross-examination, he admitted he did not know how much cash appellant had at the beginning of the prosecution period, but stated he had not shown any cash because he had no evidence to reveal any and didn't believe appellant had any. He went further to say that appellant had told the investigators of $40,000 cash as of December 31, 1941, and even if there had been such a fund, it would have been spent for the assets acquired up to December 31, 1943 (the beginning date)."

Such was the stand of the Government herein. Internal evenue Agent Whiteside testified: I knew at the last rial that Olender was contending that he had over $70,000 n cash in his safe deposit box as of December 31, 1944. R. 463.) I heard the affidavit of former Judge Monroe riedman read at the first trial of this case wherein he tated that as late as May, 1944 he knew there was over 70,000 in that box. (R. 463.) It wasn't necessary to do nything to verify or disprove that statement *as May f 1944 was not a date that was material. We wanted o know how much cash he had on hand as of December 1, 1944.*[8]

At p. 793 the Court states part of the evidence relating o Vloutis' cash expenditures thus:

> "Here, however, there is serious doubt that the point can be so easily resolved. It should be noted that

[8]The first trial was held in September, 1952. The present trial arted on August 1, 1955. On September 13, 1948 appellant filed ith the Revenue Department his comparative net worth state-ient (U.S. Ex. 10) to which was attached the affidavit of Monroe riedman to the effect that in May, 1944 Olender had over $70,000 n cash in his safe deposit box.

the investigators never did ask appellant how much cash he had on December 31, 1943. The Government's own evidence showed the following purchases or transactions by appellant: November 15, 1943, bonds in the amount of $5,571.25; December 14, 1943, bonds in the amount of $5,000.00; January 1, 1944 (the very first day of the prosecution period), bonds in the amount of $5,610.92; January 10, 1944, loan to a friend of $3,000.00; during the month of January, 1944, United States bonds in the amount of $3,825.00; February 15, 1944, stock in the amount of $1,800.00; April 13, 1944, bonds in the amount of $6,152.30. The records of the investment company (which the Government examined) and the testimony of one of its brokers (whom the Government interviewed) showed that of the amounts listed, totaling $30,959.48, *at least $23,291.48 was paid in cash.* The investment broker further testified that in December, 1943, and again early in 1944, he went with appellant to the latter's bank box; that he saw therein several large brown envelopes; that appellant opened two envelopes on each occasion and extracted cash with which to buy stocks or bonds." (Court's italics.)

The Court arrives at the following conclusion on page 793:

"Certainly, then, there was evidence to indicate to the Government that appellant had some undisclosed cash on hand as of December 31, 1943. How much he had was, of course, a fact to which only he could testify; but in the face of such evidence as the Government uncovered in the investigation, we think portions of Roussell's testimony were impermissible conclusions which invaded the province of the jury."

In the instant case we find, as was set forth in the *Vloutis* case, large cash expenditures, an independent and credible witness testifying that he went to the safe deposit box in May of 1944 wherein there was over $70,000 in cash.

In the *Vloutis* case the Government agent testified that the defendant had advised them that in 1941 he had $40,000 in cash and further testified in effect that they were not concerned with that date but what he had on December 31, 1943. Here, Agent Whiteside testified that the Government was not concerned with what Olender had in May of 1944; that the only concern was how much he had at the end of December, 1944.

In *United States v. Costello* (2 Cir.) 221 F. 2d 668 (also decided after the *Holland* case), the Government was also relying on the net worth method of proof.

The Court at p. 671 stated as follows:

> "The prosecution's proof started with a supposed 'net worth' at the beginning of the year 1946, made up of four items which, less liabilities, aggregate $250,000, and among which there is no item of cash on hand. *Concededly the 'net worth' at the beginning of each year would be falsified to the extent that any such sum was omitted; and with it would fall the computations for later years.*" (Italics added.)

On p. 672 the Court states that "the issue is narrowed to whether Costello had an accumulated cash reserve at the beginning of 1946 out of which the purchases might have come that were shown to have been made, and not declared".

Costello was charged with evading income taxes for the years 1946, 1947, 1948 and 1949. Thus, the opening net worth would be January 1, 1946. The jury found Costello not guilty for the year 1946. The Appellate Court reversed as to the year 1947 on the ground that the evidence did not establish the charge based upon the assumption that on January 1, 1946 Costello did not have a cash reserve of more than $30,000 (p. 673).

The Government contended that on January 1, 1946 Costello had no cash reserve whatever. Costello contended to the contrary. A net worth statement dated October 18, 1937 was made by Costello to the Tax Bureau in which he stated that on that day he had a cash reserve of between $25,000 and $30,000.

On pp. 672-3 the Court points out the various computations covering the indictment years and reversed the conviction on the second count of the indictment (1947), stating as follows:

> "In deference to the limitations imposed upon any use of the 'net worth' method, we feel obliged to say that the evidence did not justify a verdict based upon the assumption that on January 1, 1946, there had not been a reserve of more than $30,000; or indeed of more than $40,000."

At the beginning of the opinion in the *Costello* case the Court summed up the elements of the net worth method of proof as follows:

> "This method presupposes that the prosecution first proves what property the taxpayer had at the beginning of the year in question and what he had at the end of it. To the remainder obtained by subtracting the first from the second it adds whatever

sums it can prove that he spent in the year in question. That is the putative gross income for the year; and the remainder, after deducting the amount of gross income reported, is by hypothesis the unreported gross income. However, this is not enough, for it does not follow that all that the taxpayer expended was necessarily taxable income, or indeed income of any kind. Conceding something for the difficulty of establishing by impregnable proof how much was income, the Court is satisfied with 'proof of a likely source, from which the jury could reasonably find that the net worth increases sprang.' ''

See, also, the earlier cases of *United States v. Fenwick* Cir.) 177 F. 2d 488, 491; *Bryan v. United States* (5 r.) 175 F. 2d 223, 225; *Brodella v. United States* Cir.) 184 F. 2d 823.

So here, either the evidence established a cash reserve December 31, 1944 of $75,000 or the evidence estabhed an undetermined substantial amount of cash on ld date. In the latter event the proof of the Governnt did not meet the test laid down in the *Holland* case d did not establish to a reasonable certainty the opening t worth of appellant.

) Appellant was entitled to be credited with an additional $20,550 in his opening net worth.

The Government conclusively proved that in the early nths of 1944, appellant had expended $20,550, repreited by cashier's checks purchased with cash payable George Goodman for 822 sailor suits.[9]

[9]Note that this expenditure was made before the counting of the sh in May, 1944 by Olender and Monroe Friedman.

The Government failed and refused to credit Olender with the value of these sailor suits at the end of 1944 or, if said suits had been sold, with the proceeds of such sale. However, Olender testified that all of these suits were on hand but not included in his inventories at the end of 1944.

The evidence relating to these suits was given by appellant, Louis Levy and Morris Lerman.

Olender testified that cashier's checks (U.S. Exhibit 6) totalling $20,550 were made out at the request of Louis Levy payable to George Goodman (R. 588); that on a trip to New York Levy thought he could purchase some sailor suits; that when in New York, Levy communicated with him to send on these checks (R. 587); that as a result he received 822 sailor suits from the Seagoing Uniform Company and that when he opened the suits he found they were mismarked as the suits were all larger in size than the markings thereon (R. 589); that as his dealings were with Levy, he complained to Levy about the mismarkings of the suits (R. 590); that the suits were all large sizes and only small size sailor suits were in demand; that he had no way of cutting down these large size sailor suits (R. 588); that he put the suits in his basement where they remained over a year and Levy said he would try to sell some of them for him (R. 591); that as he had paid cash for these suits out of his safe deposit box, he didn't put any entry in the books of the Army and Navy Store of this expenditure of $20,550 and he didn't include the suits in his inventory at the end of 1944 because the transaction was indefinite and uncertain (R. 594); that in 1945 Levy sold 200 of these suits for him at

ost, to-wit, $5000 (R. 592) and that he deposited this mount in the store's bank account and entered it in the ooks as a capital investment (R. 594); that later in 1945 Levy sold 280 more of these suits for $7000 (R. 595); that e hadn't included the 822 suits in 1944 inventory as he idn't know what was going to happen to them and be- ause he hadn't made any entry of their purchase. (R. 97.)

MORRIS LERMAN testified that in 1945 he purchased 00 suits from Louis Levy for $5000 (R. 525); that he eceived the sailor suits and they were mismarked; that hey were larger than marked; that in 1945 he had tailors n his establishment who could make alterations (R. 528); hat when he found the sailor suits were mismarked he otified Mr. Levy thereof. (R. 537, 545.)

That he paid Levy with 2 cashier's checks of $2500 each. R. 526-9; Defendant's Exs. "K" and "L".) Each of hese checks is payable to L. Levy, is endorsed by Levy nd then by Army & Navy Store, per M. Olender. (R. 29-30.)

LOUIS LEVY testified that he nogtiated the purchase f these sailor suits from George Goodman for Olender R. 850); that after he returned from New York, Olender omplained that the suits were not properly marked and hat he was having trouble; that he wrote to Goodman egarding the sizes and never got a reply (R. 851); that ubsequently he sold 200 of these suits to Lerman at $25 ach and subsequently sold $7000 worth for Olender. (R. 52.)

Olender testified that he sold none of the Goodman uits during 1944 (R. 758); that in 1945 he included 322

of these suits, this being the difference between the 822 purchased and the suits sold by Levy, in his inventory at the end of that year. (R. 597.)

As these suits were purchased in 1944; were still in appellant's possession at the end of that year, they properly should have been included as part of his net worth at the end of 1944, thereby increasing his net worth by an additional $20,550.

(c) The amount of cash on hand at the end of 1945 was substantial but undetermined.

The Government in its computations credited Olender with $7200 as cash in safe deposit box on December 31, 1945. The Court ruled and so instructed the jury that this figure could not be relied upon or considered by either the Government or the jury (R. 927, 943) but that the jury could consider any evidence given by the appellant as to this amount.

Olender testified that he didn't remember how much cash was in the box at the end of 1945. (R. 715.) Thus, *just as occurred at the beginning of 1945, the amount of cash, though substantial, remained undetermined and as such throws out all computations as to Olender's net worth at the end of 1945.*

That there was a substantial amount of cash is evidenced by the record which shows that in 1946 large cash deposits were made in Olender's personal bank account as follows: May 1st—$6000, September 23rd—$1500, November 25th—$6000, December 4th—$2800, December 20th—$1500. (Defendant's Ex. "W".) The record also shows that in 1946 $5000 cash was deposited by Olender to the

lender-McGreet bank account (Defendant's Ex. "AB"; . 628); that on May 2nd—$1700 and on September 3th—$2500 cash was deposited in the Olender-Elkus bank ccount. (Defendant's Ex. "V"; R. 621.)

Olender testified that all cash transactions not evidenced y checks on either his personal or store accounts came ut of the cash in his safe deposit box. Thus, large sh transactions in 1946 amounted to $27,000 with no idence in the record of any cash receipts not deposited the bank accounts except the sum of $1725.11 received om the Fresno property. (R. 612.) These figures must given weight and consideration as was done in the se of *Vloutis v. United States* quoted from and discussed ove.

1) The Government erroneously included the sum of $7724 as an asset at the end of the year 1945.

This sum of $7724 was the proceeds of a cashier's check J.S. Exhibit 34) issued November 19, 1945 to the Army nd Navy Store and was paid by the bank on March 27, 946. (R. 340.)

The history of this check is contained in the testimony Olender, Louis Levy and the books of account of Moe araga which were admitted in evidence as Defendant's xhibits "X", "Y" and "Z", admitted in evidence by ipulation at R. 625.

Olender testified that when Louis Levy sold 280 of the oodman suits for him in 1945 for $7000, that Levy etained this money and took it to New York for the urpose of attempting to buy additional sailor suits for m (R. 595-6); that Levy delivered this $7000 to Moe

Saraga, a dealer in New York (R. 598); that around August or September of 1945 Olender had a transaction with Moe Saraga for sailor suits in which he sent to Moe Saraga checks on his store account totalling $18,000 and an additional $6500, making a total of $24,500 which, plus the $7000 that Levy had given Saraga made a total of $31,500 (R. 600); that Defendant's Exhibit "R" was an invoice from Saraga to the Army and Navy Store dated July 31, 1945 for 1000 suits at $25, total $25,000 (R. 601); that Saraga couldn't furnish all of the 1000 sailor suits, there being 49 undelivered; that he received a check from Saraga for $7725 representing the $7000 Levy had delivered to Saraga plus the balance of the refunds due on the undelivered suits; that he put the check in his bank for collection and it was returned for not sufficient funds; that he redeposited it and got a satisfactory check; that the bank charged him $1.00 for collection, leaving the $7724. (R. 603-607.)

Olender also offered in evidence his Exhibit A-I, check payable to the Army and Navy Store for $7725 dated November 15, 1945 and signed by Saraga bearing a notation thereon "Refund paid in full 49 suits at $25.00, $1,225.00; 8/6/45 deposit $6,500, $7,725.00 total."

Defendant's Exhibit AH is a certified check made out to Lou Levy for $7724 dated 6/24/1946, signed by M. Saraga on a New York bank and has writing in the upper lefthand corner reading "Repayment in full advance made". (R. 823-824.)

The last check bearing the endorsements in the following order: Louis Levy and Milton H. Olender.

The account books of Moe Saraga substantiate the fore-
oing.

Defendant's Exhibit "X", pp. 80 and 86 show the
eceipt of $24,500 from the Army and Navy Store. Page
4 of the same Exhibit shows a refund due of $7000. Page
27 shows a check dated November 15, 1945 of $7725 and
efendant's Exhibit "Z", page 50, shows additional
eceipt of $7724 and Exhibit "Y", page 33 shows under
ate of June 24, 1946 a certified check sent by Saraga to
lender for $7724.

LOUIS LEVY testified that on the sale of the sailor
uits he took the $7000 to New York and turned it over
Sarage (R. 853); that later Saraga returned the $7000
ecause he couldn't deliver any of the suits by check pay-
ble to the Army and Navy Store and this check bounced;
iat some time after he sent a check made out to Louis
evy which he turned over to Olender. (R. 855.)

It follows from the foregoing that $7000 of this $7724
epresented part of the 822 sailor suits purchased by
lender from Goodman, as above set forth, in the early
art of 1944. Either this sum of $7000 should not be
ıcluded as an asset at the end of 1945 or Olender's open-
ıg net worth on December 31, 1944 should at least be
redited with this sum of $7000. In either event it would
ot increase Olender's net worth at the end of 1945. The
dditional $724 cannot be construed as additional income
ı 1945 because it is offset by the sending to Saraga of
ıe $24,500 for which sum of $724 Olender received noth-
ıg.

(e) The Government erroneously included $20,000 worth of Government Bonds as being the property of appellant on December 31, 1945.

The evidence as to the ownership of these Bonds is conclusive. Olender testified that at the end of 1944 or early in 1945 his mother brought up $20,000 of her money which was put in the safe deposit box (R. 554); that on December 5, 1945 he purchased with cash $25,000 worth of Government Bonds (Defendant's Exhibit D-1); that $20,000 was his mother's and $5000 was his (R. 555); that he placed $20,000 worth of the Bonds in an envelope on which he wrote: "The property of Mrs. J. Olender" and the numbers of each bond; that on May 5, 1948 accountant Ringo went to the safe deposit box and that envelope was in the box with the Bonds in it (R. 556); that on August 16, 1946 he received a letter from the Treasury Department asking for an explanation of certain currency transactions and he received a second letter asking for the transaction of $25,000 on December 5, 1945. These letters are set out in the record at pp. 559 and 560; that on August 23, 1946 Olender wrote to the Internal Revenue Agent wherein he stated that of the $25,000 transaction on December 5, 1945, $20,000 represented the purchase of Bonds for his mother on her written instructions. (The letter is set forth in full in the record at pp. 560 to 562); that on November 23, 1945 defendant received a letter from his mother (Defendant's Exhibit "N"), reading in part that if he had no further need of the cash in the box she preferred that he put it in Government Bonds (R. 563); that on December 14, 1945 he received a letter from his mother (Defendant's Exhibit "O") stating that as to the Bonds he bought for her last week,

e should keep them up there (in Oakland) for me (R. 65); that he kept the $20,000 worth of Bonds for his nother until they were sold in 1953 by the Bank of America for which a check was issued payable to the Estate of Molly Olender and was deposited in the Estate f Molly Olender, she having died in the meantime. (R. 65-6.)

CHARLES RINGO, the accountant, testified that on Iay 5, 1948 he made an inventory of Olender's safe de-osit box (R. 221, U.S. Exhibit 20); that on this inven-ory he listed as "Bonds being held for mother" four 5000 U.S. Treasury Bonds giving the numbers thereof; hat he took those numbers off the Bonds (R. 228); that e made the notation that the Bonds were being held for Olender's mother on something that he saw at the safe eposit box; that they had some markings showing they ere the mother's Bonds. (R. 202, 203, 229, 230.)

MR. CARROLL of the Bank of America testified that n July of 1943 the bank received an order to sell the ame Bonds that were listed in Ringo's inventory by num-er signed "Estate of Molly Olender by Milton Olender" Defendant's Exhibit "H", R. 518); that pursuant to said rder the Bonds were sold and a cashier's check (Defend-nt's Exhibit "I") was issued payable to the order of he Estate of Molly Olender for $18,959.40. (R. 520.)

Defendant's Exhibit "P" is a supplementary inventory led in the Estate of Molly Olender on March 30, 1953 y Milton Olender and on page 3 thereof lists as assets f the estate $20,000 worth of U.S. Bonds bearing the ame numbers as those listed on the inventory made by Ringo.

Starting with the letters written by Olender's mother in November and December of 1945, followed by the information given to the Internal Revenue Department in August of 1946, the inventory taken by Ringo in May of 1948, the sale of the Bonds, the issuance of the check to the Estate of Olender's mother, the depositing of that amount in her estate and the listing of the Bonds as an asset of that estate, we find an unbroken line of evidence establishing that the $82,000 worth of Bonds relied on by the Government as property of Olender at the end of 1945 should be reduced by the sum of $20,000.

(f) Computations and summary of the foregoing points.

A consideration of the foregoing points demonstrates that no competent proof was offered establishing to a reasonable certainty Olender's opening and closing net worth for the year 1945 and so the evidence was insufficient to establish the charges in counts 1 and 2 of the indictment.

Disregarding Olender's testimony as to the amount of cash on hand at the end of 1944, the remaining evidence in the case, oral and documentary, establishes a large amount of money far in excess of the sum of $50,000 the Government sought to rely upon. If we add Olender's testimony that there was $75,000 in cash on this date, then we find that Olender's net worth at the end of 1945 was at least $25,000 less than that contended for by the Government.

In *Holland v. United States,* 348 U.S. 121, the Supreme Court states as follows:

"We agree with petitioner that an essential condition in cases of this type is the establishment, with reasonable certainty, of an opening net worth, to serve as a starting point from which to calculate future increases in the taxpayer's assets. The importance of accuracy in this figure is immediately apparent, as the correctness of the result depends entirely upon the inclusion in this sum of all assets on hand at the outset."

On p. 138 the Supreme Court announces that:

"Increases in net worth, standing alone, cannot be assumed to be attributable to currently taxable income. But proof of a likely source, from which the jury could reasonably find that the net worth increases sprang, is sufficient."

Here, there is no proof of any such likely source from which one could reasonably find that any increases sprang in Olender's net worth. Olender testified to the only sources of income he had and from which any expenditures were made by him. There was no evidence in the record to the contrary.

Again in the *Holland* case, the Supreme Court rules as follows:

"When the Government rests its case solely on the approximations and circumstantial inferences of a net worth computation, the cogency of its proof depends upon its effective negation of reasonable explanations by the taxpayer inconsistent with guilt. Such refutation might fail when the Government does not track down relevant leads furnished by the taxpayer—leads reasonably susceptible of being checked, which, if true, would establish the taxpayer's innocence. When the

> Government fails to show an investigation into the validity of such leads, the trial judge may consider them as true and the Government's case insufficient to go to the jury."

Revenue Agent Whiteside testified that no attempt was made to ascertain the amount of cash on hand at any of the indictment periods; that they preferred to take Olender's extrajudicial statement in that regard and ignored the affidavit of Monroe Friedman attached to the net worth statement filed in September of 1948 (U.S. Ex. 10); that though they had the books, records and checks of Olender and knew of large cash expenditures, no effort was made to determine the amount of cash expenditures as distinguished from withdrawals from Olender's bank account (R. 464-469); that he knew of Monroe Friedman's affidavit at the first trial (1952) and heard Olender contend at that trial that he had over $70,000 in his safe deposit box. (R. 463-4.)

The Government made no attempt whatever to investigate any lead as to the amount of cash Olender had on hand at any time involved. Under these circumstances the judge should have considered Olender's testimony supported by Monroe Friedman's affidavit and testimony and the evidence of cash expenditures and transactions as true and granted the motion for judgments of acquittal.

In *Smith v. United States,* 348 U.S. 147, 155, it is stated:

> "Without proof that assets on hand at the beginning of the prosecution period did not account for the alleged net worth increased, the Government could not succeed."

The tax returns filed on behalf of appellant and his wife for the year 1945 (U.S. Exs. 1 and 2) showed a joint net taxable income of $41,067.61. The Government contended (U.S. Ex. 50) that there was unreported net taxable income for 1945 in the sum of $46,931.63. This figure of the Government was based on the use of $50,000 cash on the opening date and $7200 cash on the closing date. Figures which the Court ruled could not be used.)

As demonstrated above, $20,000 (the mother's bonds) was erroneously included in the closing net worth. Also the sum of $7724 was likewise erroneously included. If Olender's testimony is accepted that he had $75,000 in cash on the opening net worth date, then we find that the Government's opening net worth figure must be increased by $25,000 and the closing net worth decreased by $27,724 leaving no unreported income for the year in question.

If we disregard the figure of $75,000 and add to the opening net worth the value of the Goodman suits of $20,550, the same result is arrived at. Of course, if the opening net worth is credited with both $25,000 and $20,550, then the computations show an over-statement of taxable income.

If the jury disregard the testimony of both Olender and Friedman, then there is no evidence establishing to a reasonable certainty the net worth of Olender on December 31, 1944 and December 31, 1945, resulting in a total failure of proof.

So, no matter which way the figures are arranged, the result is the same; either evidence of the opening and

closing net worths were so indefinite as not to constitute reasonable certainty or the adjusted opening and closing net worths result in no unreported taxable income.

In addition to the foregoing, Olender testified that in 1944 and 1945 he received gifts from his mother totalling $8500 in cash and that this money went into his safe deposit box. (R. 573, 582, 642.) He also testified that his mother-in-law had delivered to him during these years $2500 to be held in trust for Olender's stepson (R. 694); that this money went into his general account and subsequently was transferred to his wife's bank account and by her paid out to his stepson. There was also evidence of the receipt of several thousand dollars from his Fresno properties which in turn went into his safe deposit box. (R. 614.)

We have not discussed whether these contentions of Olender were correct, although they are supported by other portions of the record, for the reason that whether he did or did not receive these amounts would not change the foregoing conclusion that neither the opening nor closing net worth of appellant was established to a reasonable or any degree of certainty.

II. THE EVIDENCE WAS INSUFFICIENT TO ESTABLISH THE OFFENSES SET FORTH IN COUNTS 3 AND 4 OF THE INDICTMENT. (Specification of Errors Nos. I, IV and V.)

The foregoing argument demonstrates that the Government failed to prove to a reasonable certainty or to any degree of certainty at all the net worth of defendant on December 31, 1944 and on December 31, 1945, the last date being the closing net worth for the year 1945 and the opening net worth for the year 1946. A failure to prove the net worth on either of these dates renders all computations for the year 1946 indefinite, uncertain and insufficient to establish the charges set forth in counts 3 and 4 of the indictment.

In *United States v. Costello,* (2 Cir.) 221 F. 2d 668, 669, Costello was charged with evading income taxes for the years 1946, 1947, 1948 and 1949. The jury acquitted as to the year 1946 and the Court of Appeals reversed as to the year 1947 because the opening net worth at the beginning of 1946 had not been established to the degree set forth by the Supreme Court in the *Holland* case and, in doing so, said:

> "Concededly the 'net worth' at the beginning of each year would be falsified to the extent that any such sum was omitted; and *with it would fall the computations for later years.*" (Italics added.)

As additional reasons why the opening net worth for the year 1946 (December 31, 1945) was never sufficiently established, we find the following cash transactions in 1946, (bearing in mind that the Government unsuccessfully sought to rely on the figure of $7200 being the amount of cash on hand as of this date): Defendant's

Ex. "W", shows the following amounts in cash were deposited to Olender's personal account on the following dates in 1946: May 1st—$6000; September 23rd—$1500; November 25th—$6000; December 4th—$2800; December 20th—$1500. The record further establishes that on May 29, 1946 defendant purchased a cashier's check with cash in the sum of $3000 (R. 309-11), and a cash deposit of $2500 on September 19, 1946. (R. 311, U.S. Ex. 29.)

The record further disclosed that in 1946 $5000 in cash was deposited by Olender to the Olender-McGrete bank account (Defendant's Ex. "AB"; R. 628); that on May 2d $1700 and on September 18th $2500 cash was deposited by Olender in the Olender-Elkus bank account. (Defendant's Ex. "V"; R. 621.)

These cash deposits in 1946 must be considered as indicating a large amount of cash on hand as of December 31, 1945. (Cf. *Vloutis v. United States, supra.*)

Although the failure to prove the original opening net worth on December 31, 1944 destroyed any proof of net worth as of December 31, 1945 (Cf. *United States v. Costello, supra*), the cash expenditures made in 1946 render all proof by the Government wholly insufficient as to the net worth of appellant on December 31, 1945, even if we disregard the insufficiency of the proof as to his net worth on December 31, 1944.

II. THE COURT ERRED IN ADMITTING AS EVIDENCE FOR THE GOVERNMENT THE TESTIMONY OF JOHN SANCHIRICO AND THE EXHIBITS INTRODUCED THEREUNDER. (Specification of Error No. VI.)

Sanchirico testified that he was associated with the Seagoing Uniform Corporation in Brooklyn, New York since 1929. (R. 889.) He was asked if he entered into a transaction with George Goodman in connection with the manufacture of sailor suits and then was asked as to what Goodman was to do as part of his duties in connection with that transaction. An objection was made and overruled that the question called for the opinion and conclusion of the witness and called for hearsay testimony. (R. 891.) The witness then went on to describe the arrangement made with Goodman (R. 893) and then stated that he was familiar with the books and records of the Seagoing Uniform Corporation; that the original invoices and shipping tickets for 1944 and 1945 had been destroyed. (R. 893.)

The witness was then asked what arrangements were made in the shipment of goods which were the property of Mr. Goodman and which had been manufactured by the Seagoing Uniform Corporation. Appellant objected that this called for hearsay testimony and the Court overruled the objection. (R. 894.)

The witness then stated that when uniforms were manufactured for Goodman's account they were shipped in accordance with Goodman's instructions to individual customers; that at the time of shipment the clerk would write a shipping memorandum which would indicate how many garments were involved and where they were shipped to together with the name of the customer and the street and

number and that after the shipping memorandum was prepared the shipment was made usually the same day. (R. 895.)

The witness then identified a series of documents consisting of shipping memoranda and invoices. Appellant objected to the introduction in evidence of these documents on the ground that all this was not proper rebuttal. The Court overruled the objection and the documents were admitted in evidence as U.S. Exs. 66 to 71 inclusive. (R. 900-903.)

The witness then explained the Exhibits as follows:

Ex. 66—Shipment of 103 suits to Olender and 300 suits to the Army and Navy Store, Oakland on February 8, 1944.

Ex. 67—60 suits shipped February 19, 1944 to an Army and Navy Store or Olender.

Ex. 68—70 suits shipped May 25, 1944 to Olender.

Ex. 69—30 suits shipped June 8, 1944 to Olender or an Army and Navy Store.

Ex. 70—370 suits shipped June 8, 1944.

Ex. 71—71 suits shipped June 14, 1944.

The witness then testified that he was in the service during 1944 (R. 903) and had little contact with the management of the Seagoing Uniform Corporation while he was in the Coast Guard. (R. 904.)

On cross-examination he testified he was not there when the shipping receipts and invoices were made; that the invoices were not sent to the person to whom the suits were shipped but were sent to George Goodman (R. 906);

that the invoices showed the price of the goods to Goodman (R. 910); that the name "Army and Navy Store" was a trade name used by many people in many cities (R. 910); that he didn't know whether the goods on Exhibits 66 to 71 were actually shipped; that he was merely testifying as to the custom (R. 911); that he was in the service 25 months from August, 1943 to September, 1945.

The objections of appellant should have been sustained.

It must be apparent that the testimony given by the witness was hearsay of the rankest kind. He testified that he was not present when the various Exhibits were made; that he didn't know whether the goods had been shipped; that the invoices were not sent to the person to whom he thought the suits had been shipped but were sent to George Goodman.

Testimony as to arrangements that were made between the Seagoing Uniform Company and Goodman was hearsay; appellant was not a party to these transactions and evidence thereof certainly was not binding upon appellant.

An examination of the Exhibits, 66 to 71 inclusive, shows that each of the shipping memoranda contains the following legend: "Ship to George Goodman". Underneath this legend is a list of stores regarding which the witness testified that in his opinion the goods had been sent to the stores so enumerated. The invoices were sent to George Goodman.

An examination of these various Exhibits is of interest.

It must first be remembered that there were all kinds of stores operating under the name of "Army and Navy

Store''. Sanchirico so testified. (R. 910.) The witness Louis Levy testified that there were many Army and Navy Stores. (R. 877.) Morris Lerman testified that he was operating an Army and Navy Store on Broadway in Oakland. (R. 524.)

Ex. 66 contains the item that on February 8, 1944, 435 suits were shipped to an Army and Navy Store in Oakland, California.

Ex. 67 shows in typewriting the shipment of suits to an Army and Navy Store, San Francisco. The name ''San Francisco'' is stricken out and in handwriting there is inserted ''1026 Broadway, Oakland, Cal.''

Exs. 68 and 69, as do all the others, show the legend ''Ship to George Goodman'' and underneath are the itemizations of certain suits to Milt Olender.

Ex. 70 which is in typewriting contains nothing as to where the goods are to be shipped other than to George Goodman. However, there is written across the shipping memoranda in a handwriting entirely different from that in which the document was written, the words ''Milt Olender'' and the invoice is the same.

Ex. 71 says ''Milt Olender''.

Olender denied that he ever received any of these goods. It is possible that some of these goods may be the reflection of the purchase in 1944 of the 822 suits for $20,550 which Louis Levy arranged with Goodman for the purchase of for Olender.

There is no evidence that any of these goods were ever shipped to Olender. No records showing payment were

ever introduced by the Government; no express receipts were produced such as were found relative to the $20,550 transaction.

This testimony of Sanchirico and the Exhibits were undoubtedly introduced by the Government for the purpose of discrediting Olender's testimony that he had no other transaction with Goodman in 1944 except the one for $20,550 and the one for $1380. The foregoing testimony was hearsay and the mere opinion and conclusion of the witness and should not have been admitted as evidence in the case.

It is impossible to measure the degree of prejudice to the appellant that the admission of this testimony produced. As said by this Court on the prior appeal, *Olender v. United States,* 210 F. 2d 795:

> "This was by no means an open and shut case for the government. The critical issues of fact were close and hotly contested. On the cold record there is little to choose between the government and defense versions of the facts on these issues. Inconsistencies and occasional confusion developed on both sides of the controversy as details of complex financial transactions of appellant multiplied. The jury was left with the difficult decision of which version of the facts to accept. And since the defense case rested primarily upon the testimony of appellant, it was his credibility which was principally at issue."

The foregoing language applies with full force to the present case before the Court.

CONCLUSION.

There was a total failure of proof to establish the charges set forth in the indictment. The judgment should be reversed.

Dated, San Francisco, California,
March 30, 1956.

LEO R. FRIEDMAN,
Attorney for Appellant.

(Appendix Follows.)

Appendix.

Appendix

U. S. EXHIBIT 50

Net Worth

	12-31-44	12-31-45	12-31-46	Exhibit No.	Witness
tore register	$ 2,500.00	$ 1,000.00	$ 1,000.00		Stipulation
tment, Army- Store	84,735.50	89,800.50	57,414.65		Stipulation and Ringo
ess bank accts.	3,822.89	31,485.58	36,783.05		Stipulation
heck #25104696	.....	7,724.00	.....	34	Carroll
ed drawing check on stock,	1,000.00	.....	.....		Stipulation
ing Asturias)	552.95	1,150.00	45,382.40		Stipulation
stock	.....	.....	5,000.00	31	Horne
oan	.....	.....	5,000.00	31	Horne
ds: Series "E"	693.75	768.75	768.75		Stipulation
te, net of depr.	31,600.00	30,875.00	68,511.31		Stipulation
l Furniture	5,000.00	5,000.00	29,701.67		Stipulation
osta Associates,	.....	.....	1,000.00		Stipulation
					Stipulation
isury Bonds					(amount)
51-53	10,000.00	10,000.00	10,000.00		
59-62	.....	8,000.00	8,000.00		
56-59	1,000.00	1,000.00	1,000.00		
52-54	13,000.00	13,000.00	13,000.00		
59-62	.....	25,000.00	25,000.00		
59-62	.....	25,000.00	.....	28	Ringo
Life Insurance	.....	15,833.46	15,833.46		Stipulation
afe Deposit Box	50,000.00	7,200.00	.....	21	Ringo
	$203,905.09	$272,837.29	$323,395.29		
TIES					
able					
Olender	$ 5,000.00	$ 5,000.00	$ 15,500.00		Stipulation
Payable					
. Sloane	.....	.....	24,701.67		Stipulation
	$ 5,000.00	$ 5,000.00	$ 40,201.67		
h	$198,905.09	$267,837.29	$283,193.62		

i

Net Income

	1945	1946	Exhibit No.	Witne
Net worth at December 31	$267,837.29	$283,193.62		
Net worth at January 1	198,905.09	267,837.29		
	$ 68,932.20	$ 15,356.33		
Increase in Net Worth				
Add—Nondeductible expenditures				
Included in stipulation	19,081.32	23,985.63		
Other expenditures introduced during trial (schedule attached)	125.49	4,335.04		
	$ 88,139.01	$ 43,677.00		
Deduct nontaxable portion of net gain from sales of assets	139.77	464.47		Stipulat
Net taxable income				
Husband / Wife				
1945 $44,562.19 / $43,437.05	$ 87,999.24			
1946 22,363.76 / 20,848.77		$ 43,212.53		
Net taxable income per returns				
Husband / Wife				
1945 $21,096.38 / $19,971.23	$ 41,067.61			
1946 12,514.81 / 10,999.81		$ 23,514.62		
Unreported Income				
Husband / Wife				
1945 $23,465.81 / $23,465.82	$ 46,931.63			
1946 9,848.95 / 9,848.96		$ 19,697.91		

Nondeductible Expenditures

	1945	1946	Exhibit No.	Witness
Expenditures not included in Stipulation				
L. Magnin	.....	$ 863.73	27	Davis
Gray Shop	.....	1,391.01	30	Mendelso
Milt Young	.....	925.00	23	Young
Geo. Belling	$ 125.49	155.30	26	Belling
Furs		1,000.00		Foley

H. Olender

Year – 19

d, California

Tax Liability

	Husband	Wife	Total
ome per returns	$21,096.38	$19,971.23	$41,067.
rted income (½ each spouse)	23,465.81	23,465.82	46,931.
ome corrected	$44,562.19	$43,437.05	$87,999.
net long-term capital gain	69.89	69.88	139.
y net income	$44,492.30	$43,367.17	$87,859.
al tax exemption, per returns	500.00	500.00	1,000.
mal tax net income	$43,992.30	$42,867.17	$86,859.
y net income	$44,492.30	$43,367.17	$87,859.
x exemptions, per return	1,000.00	500.00	1,500.
tax net income	$43,492.30	$42,867.17	$86,359.
tax @ 3%	$ 1,319.77	$ 1,286.02	$ 2,605.
(highest rate 69%)	22,149.69	21,718.35	43,868.
tax	$23,469.46	$23,004.37	$46,473.
% net long-term capital gain	34.94	34.94	69.
x liability	$23,504.40	$23,039.31	$46,543.
iability, per returns	7,931.86	7,563.89	15,495.
reported tax liability	$15,572.54	$15,475.42	$31,047.

Hilton H. Olender — Year – 4

Oakland, Calif.

Tax Liability

	Husband	Wife	Tot
Net income per returns	$12,514.81	$10,999.81	$23,51
Unreported income (½ each spouse)	9,848.95	9,848.96	19,69
Net income corrected	$22,363.76	$20,848.77	$43,21
Deduct, net long-term capital gain	232.24	232.23	46
Ordinary net income	$22,131.52	$20,616.54	$42,74
Exemptions, per returns	1,000.00	1,000.00	2,00
Income subject to normal tax and surtax	$21,131.52	$19,616.54	$40,74
Normal tax @ 3%	$ 633.95	$ 588.50	$ 1,22
Surtax (highest rate 53% on husband, 50% on wife)	7,259.71	6,468.27	13,72
Tentative tax	$ 7,893.66	$ 7,056.77	$14,95
5% reduction of tentative tax	394.68	352.84	74
Partial tax	$ 7,498.98	$ 6,703.93	$14,20
Add, 50% net long-term capital gain	116.12	116.12	23
Total tax liability	$ 7,615.10	$ 6,820.05	$14,43
Tax liability per returns	3,054.85	2,507.94	5,56
Unreported tax liability	$ 4,560.25	$ 4,312.11	$ 8,87

SPECIFICATION OF ERROR NO. VI.

Amplification thereof by setting forth the substance of the testimony of John Sanchirico and the exhibits introduced during his examination, and the objections of appellant.

JOHN SANCHIRICO, called by the Government in rebuttal, testified in substance as follows:

My home address is in Brooklyn, New York. The Seagoing Uniform Corporation is located in Brooklyn. I have been associated with the Seagoing Uniform Corporation since 1929 and have been active in management since 1940. (R. 889.) The corporation was engaged in the manufacture of naval uniforms in 1944. I do not know Mr. Olender. I knew a Mr. George Goodman. (R. 890.) I met Goodman in 1943.

"Q. (By Mr. Lockley). Can you just answer that question yes or no, did you enter into some transaction with Mr. Goodman in connection with the manufacture of sailor suits?

A. Yes, sir.

Q. And what was Mr. Goodman to do as a part of his duties in connection with that transaction?

Mr. Friedman. Now I will object on the ground first the question calls for the opinion and conclusion of the witness, and secondly, it calls for hearsay testimony.

The Court. I will allow it." (R. 891.)

We made an arrangement with Goodman whereby he was to supply the materials and we were to make up the uniforms as the result of which, each of us would retain 50% of the uniforms made. We had no control over the 50% of uniforms allocated to Goodman. (R. 893.) I am familiar with the books and records of the Seagoing

Uniform Corporation. The original invoices and shipping tickets for 1944 and 1945 have been destroyed. (R. 893.) During 1944 uniforms were hard to get. In 1944 we did approximately $738,000 of business with Mr. Goodman.

"Q. What arrangements were made in the shipment of goods which were the property of Mr. Goodman, manufactured by your Company?

Mr. Friedman. Well, again to protect my record, if the Court please, I will object on the ground this calls for hearsay testimony so far as the defendant is concerned.

The Court. I will allow it." (R. 894.)

After we manufactured the Navy uniforms for Goodman's account, they were shipped in accordance with Goodman's instructions, not to Goodman but to individual customers. At the time the shipment was made the shipping clerk would hand write a shipping memorandum which would indicate how many garments were involved and where they were shipped to, the name of the customer and the street number or city. After the shipping memorandum was prepared, the shipment was made usually the same day. (R. 895.) A day or two later the invoices were prepared from the shipping memorandums. (R. 896.)

(Series of photostats marked for identification as U. S. Exhibits 66 to 71 inclusive.)

Exhibit 66 is two documents. The top sheet is a shipping memorandum and the second one is the invoice. Those records were kept by me in the ordinary course of the business of the Seagoing Uniform Corp. They relate

shipments to Milton Olender. On the bottom line it is 133 suits, 18 oz. Army Navy Store, Oakland, California 22''. The shipments would be made pursuant to the information contained on Exhibit No. 66.

Ex. No. 67 is an invoice and indicates a shipment to e Army Navy Store at 1026 Broadway, Oakland. The iginal has been destroyed.

Ex. No. 68 is a shipping memorandum and an invoice lating to shipments to Milton Olender. (R. 898.)

Ex. No. 69 is also a shipping memorandum and invoice dicating a shipment to Milton Olender.

Ex. No. 71 is a shipping memorandum and an invoice lating to shipments to Milton Olender.

All these shipments were made pursuant to instructons received from George Goodman. (R. 898.)

''Mr. Lockley. All right. I offer in evidence Exhibits to 71, inclusive, your Honor.

The Court. Let me ask the witness——

Mr. Friedman. I am going to object——

The Court. Beg your pardon.

Mr. Friedman. Beg your pardon, your Honor.

I object on the ground all this is not proper rebuttal.

The Court. I want to ask the witness: All these records you are identifying, are they records kept by your mpany in the regular course of this business?

The Witness. Yes, your Honor.

The Court. And was it its business to keep those cords?

The Witness. Yes, sir.

The Court. And you say it is not proper rebuttal. I will overrule it, and you may take your exception on it.

The Clerk. U.S. Exhibits 66 to 71, inclusive, heretofore marked for identification, now in evidence."

(The witness here explains the Exhibits as follows:

Ex. 66—133 suits shipped February 8, 1944 to Olender and 300 suits shipped February 8, 1944 to the Army and Navy Store, Oakland.

Ex. 67—60 suits shipped February 19, 1944 to an Army and Navy Store or Olender.

Ex. 68—70 suits shipped May 25, 1944 to Olender.

Ex. 69—30 suits shipped June 8, 1944 to Olender or an Army and Navy Store.

Ex. 70—370 suits shipped June 8, 1944.

Ex. 71—71 suits shipped June 14, 1944.) (R. 900-903.)

"Q. Do you recall Mr. Goodman ever having complained to you that some of the shipments or the manufacturing by you resulted in suits being mismarked, so that a size 34, marked as such, was actually about a size 38?

A. Well, I was in service during 1944, and I wouldn't know of any such happening." (R. 903.)

I had very little contact with the management and operation of the Seagoing Uniform Corporation while I was in the Coast Guard. (R. 904.)

Cross-Examination. Ex. 66 is a shipping receipt and invoice made to George Goodman. I was not there when it was made. (R. 905.) This transaction was between George Goodman and Seagoing and no others. Accord-

ing to the shipping memorandum when the goods were sent to any particular place designated, an invoice did not accompany them. The invoice went to George Goodman. (R. 906.) The invoices here show the price of the goods to Goodman. What he sold them for was no concern of ours. (R. 910.) As to whether I knew there was more than one store in one city operating under the name of Army and Navy Store, that happens to be a trade name used by many people in many cities. (R. 910.) As to whether the goods on Exhibits 66 to 71 were actually shipped, I am merely testifying as to the custom. (R. 911.) I was in the service 25 months and was discharged in the month of September, 1945. I entered the service in August, 1943. (R. 911-12.) During this period we would not keep a ledger account as to the consignees named in these shipping receipts. Our ledger account was with George Goodman. (R. 913.)

No. 14,916

IN THE

United States Court of Appeals

For the Ninth Circuit

MILTON H. OLENDER,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

On Appeal from the United States District Court for the Northern District of California.

BRIEF FOR THE UNITED STATES.

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PERNAU-WALSH PRINTING CO., SAN FRANCISCO

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No. 14,916

IN THE

United States Court of Appeals
For the Ninth Circuit

[ILTON H. OLENDER,
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vs.

NITED STATES OF AMERICA,
Appellee.

On Appeal from the United States District Court for the Northern District of California.

BRIEF FOR THE UNITED STATES.

OPINION BELOW.

The District Court wrote no opinion.[1]

JURISDICTION.

On February 27, 1952, a four-count indictment was ed against appellant in the United States District urt for the Northern District of California charg-

[1] This was the second trial and conviction in this case. The mer conviction was reversed by this court in *Olender v. United tes*, 210 F.2d 795.

ing wilful attempts to evade his own income taxes and those of his wife for the calendar years 1945 and 1946, in violation of Section 145(b) of the Internal Revenue Code. (R. 3-7.) Jurisdiction was conferred on the District Court by 18 U.S.C. Section 3231.

After a jury trial appellant was found guilty as charged (R. 7); sentence was imposed and judgment was entered on August 23, 1955. (R. 8-10.) Notice of appeal was filed on August 23, 1955. (R. 10-11.) The jurisdiction of this court is invoked under 28 U.S.C. Section 1291.

QUESTIONS PRESENTED.

1. Whether the trial court erred in denying appellant's motion for judgment of acquittal made at the conclusion of all the evidence in the case.

2. Whether the evidence was sufficient to support the verdict on each count of the indictment.

3. Whether the trial court erred in admitting in evidence the rebuttal testimony of John Sanchirico and exhibits 66 to 71, inclusive.

STATUTE INVOLVED.

Internal Revenue Code:

Sec. 145. Penalties.

* * * * * * *

(b) *Failure to Collect and Pay Over Tax, or Attempt to Defeat or Evade Tax.* Any person required

under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

* * * * * * *

STATEMENT.

The four count indictment charged appellant with wilfully attempting to defeat and evade a large part of his own and his wife's income taxes, computed on the community property basis. The first and second counts charged him with filing false returns for the year 1945 in which he stated he and his wife had a net income of $41,067.61 on which the taxes amounted to $15,495.75, whereas he knew that their net income for the year was $67,982.22 and that the taxes due amounted to $32,517.74. The third and fourth counts charged that he filed false returns for the year 1946 in which he stated that their net income was $23,514.62 on which they owed income taxes of $5,562.79, whereas he knew that they had a net income of $46,042.43 and owed taxes amounting to $15,922.38. (R. 3-6.) After being convicted on all counts (R. 7) appellant was sentenced to three years' imprisonment on each

count, to run concurrently, and fined $10,000 on count 1 and $10,000 on count three, a total of three years and $20,000. (R. 8-10.)

Prior to trial, since the government's case was based upon increases in net worth, counsel entered into a stipulation covering most of appellant's assets and liabilities at the close of 1944, 1945, and 1946. (R. 129-142, Ex. 11, 11a.) At the trial the chief disputed issues of fact were:

1. The amount of cash, if any, in the safe deposit boxes of appellant as of December 31, 1944, 1945 and 1946.

2. Whether bonds purchased by appellant and in his possession on December 31, 1944 in the amount of $20,000 belonged to him or his mother.

3. Whether appellant was entitled to be credited with $20,550 as of December 31, 1944, as the value of sailor suits purchased early in 1944 from Goodman and not shown on appellant's closing inventory for the year 1944.

4. Whether a cashier's check of $7,724 purchased in 1945 and not paid until March, 1946, should be included as an asset of appellant at the end of 1945.

The evidence to support the verdict may be briefly summarized as follows:

During the years 1944 to 1946, appellant was sole proprietor of the Army and Navy Store, 1026 Broadway, Oakland, California (R. 46, 96, 148, 550) dealing in military supplies and uniforms and camping equip-

ıent. (R. 96, 550.) He employed a bookkeeper about n hour a day, 3 or 4 days a week. (R. 593.)

Appellant prepared his own tax return for 1945 and 946 and for many years before, as well as preparing ax returns for relatives, employees and friends. (R. 4, 630-631.) He is a graduate of the University of 'alifornia, where he studied accounting, and auditing. R. 630.)

The store records consisted of a cash receipts and isbursements book, a general ledger or general jour- al and purchase register or accounts payable register. R. 101.)

During 1947 Treasury Agent Blanchard called on ppellant and asked him if he had done any business vith George Goodman Sales Agency (hereinafter re- erred to as Goodman) which was then under in- estigation. (R. 47, 50-52, 66.) Appellant thereafter roduced a check to Goodman for $1,380 and an in- oice (Exhibit 9) and said that he had been trying o get sailor suits from the east, but this was the only ransaction with Goodman he could find in his books R. 52, 68-69) or that he had had. (R. 70.)

In the course of investigation at the Bank of Amer- ca in Oakland, Blanchard discovered nine cashier's hecks, totaling $20,550, purchased by appellant in 'anuary, 1944, with currency, and payable to Good- nan. (R. 55, Ex. 6.) Blanchard questioned appellant bout these checks and appellant acknowledged that he purchase applications were in his handwriting, ut he had no recollection of having purchased the

checks or having received merchandise for them. (R. 88-91, Ex. 8 and 9, cf. 745-750.)

In December, 1947, as a result of Blanchard's further checks of express company records which reflected the receipt of merchandise shipped to appellant by Goodman in January and February, 1944, and Treasury currency reports showing unusual currency transactions, Revenue Agent Root began investigation of appellant's income tax returns for 1944 and 1945. (R. 93-94, 103-104, 305-312, 788-793, Ex. 29.) After examining the store books for several days Root was unable to find any record of the Goodman transactions on the books. (R. 104.) Appellant was still unable to recall the transactions. (R. 104.) Appellant also failed to produce records of a partnership in Fresno, records of rental property or records of government bonds. (R. 106.) Nor could store sales be verified from tapes. (R. 122-123.)

Root then informed appellant that in view of the record of cashier's checks purchased; the express company records showing receipts of merchandise from Goodman; and the record of cash transactions, he would like a comparative net worth statement for each year from January 1, 1942, to December 31, 1947. (R. 107, 119-210.)

Appellant then employed Sargent & Co., certified public accountants to prepare a net worth statement and was turned over to Charles R. Ringo, a partner. (R. 144-146.) Ringo attempted unsuccessfully to prepare a yearly net worth statement from bank records, Army and Navy store books, and questioning of ap-

pellant. (R. 146-152, 156-157.) He asked appellant for an estimate of his net worth at the end of each year and prepared questions to ask him. (R. 147, 157-159.) Exhibits 17 and 18, in appellant's handwriting are estimates of his assets and liabilities as of January 1, 1942, and January 1, 1948, respectively. (R. 157-159.) Similar statements submitted to Ringo for the intervening years were returned to appellant and were not available at the trial (R. 159), but Ringo had prepared a summary of the information on those statements. (Ex. 19, R. 163-168.) The summary (Ex. 19) showed cash in vault of $75,000 on December 31, 1941 and 1942; $69,000 on December 31, 1943; $50,000 on December 31, 1944; $7,200 on December 31, 1945, and none on December 31, 1946. (R. 166-167.)[2] These amounts were supplied by the appellant from memory as he had no records. (R. 243-246.)

After Ringo prepared a preliminary net worth statement he went over it with appellant and appellant then informed him of an additional asset of a single premium life insurance policy costing $15,833.46 in 1945. (R. 187-188, 250-251.) Ringo told appellant that this would increase income and throw the net worth out of balance, and appellant then asked him to leave $5,000 in stock of Asturia Corporation off the statement.[3] (R. 188-191, 251-252, 278-284, 303-304.)

---

[2]The amounts of cash disclosed by Ex. 19 were used in the government's net worth statement. (Ex. 50, printed in appendix to appellant's brief.)

[3]Appellant actually invested $10,000 in stock and loans to Asturia's Corporation, but only $5,000 was disclosed to Ringo. (R. 192, 324-325.)

Appellant thereafter went to Fresno and returned with a list of alleged gifts from his mother, Mrs. J. Olender, during the period 1942 to 1948, totaling $10,500 which Ringo included in the net worth statement. (R. 191-192, Ex. 10.)[4]

Ringo also testified that in the course of preparing the net worth statement he inventoried appellant's safety deposit boxes and saw $33,000 worth of bearer or coupon government bonds, only $13,000 of which were included in appellant's assets on the net worth statement, Exhibit 10. (R. 220-222.) He stated that he had some reason to indicate that the $20,000 balance of bonds belonged to appellant's mother, but he couldn't remember what it was. (R. 221-222.) Ringo admitted that he had prepared appellant's 1947 tax return, and that interest of $1,225 on the total bond holdings of $33,000 had been reported in that return. (R. 223-226.)

Appellant submitted the net worth statement (Ex. 10) prepared by Ringo to Agent Root and swore to it under oath as a true, correct and complete statement on September 13, 1948. (R. 108-110.) Thereafter, on October 12, 1948, Special Agent Whiteside was assigned to work with agent Root in the investigation. (R. 403.)

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[4]Records of the bank accounts of appellant's mother in the Bank of America, Fresno, California, disclose withdrawals on the dates and in the amounts of the claimed gifts to appellant. However, the withdrawals were traced by deposit slips and ledger cards to other accounts of Mrs. Olender or to the account of Terry Olender Gambord, appellant's sister. There were no similar withdrawals in amount or dates which might have been turned over to appellant. (R. 366-381.)

Whiteside discovered that there had been left off the net worth statement (Ex. 10) a bank account in the name of appellant's wife;[5] investment in Asturia's Corporation of $5,000; and jewelry, furs and other personal effects purchased during 1945 and 1946. (R. 403-404, 406, 422.) Expenditures for such non-deductible personal items were established at the trial, in addition to amounts stipulated, to be $125.49 for 1945 and $4,335.04 for 1946. (R. 199-205, 207-210, 212-219, 317-319, 349-355, Ex. 23, 26, 27, 30.)

During his employment Ringo prepared an analysis of the Army and Navy store net worth from the books, taking into consideration the inventory on hand at the end of each year, as shown by the records. (R. 184-187, Ex. 22.) The year-end merchandise inventory so shown was stipulated to be $84,011.26 on December 31, 1944; $83,394.64 on December 31, 1945, and $57,449.59 on December 31, 1946. (R. 130, 184-187.) Appellant did not advise Ringo that he had any transactions which did not result in profit, and did not inform him of any stock on hand during 1944 and 1945 which was not included in the inventory records. (R. 275-277.)

On the basis of the stipulation (Ex. 11, 11a) and the evidence it had presented, the government submitted a computation of appellant's net worth as of the last day of the years 1944, 1945 and 1946. (Ex. 50 printed in Appellant's Brief, Appendix, page i.) The

[5]The bank account of Mrs. Betty Olender, in the Bank of America, Oakland Main Office, was stipulated to have the following year and balances: (R. 134) 1944—zero; 1945—$5,000; 1946—$10,070.60.

government allowed $50,000 cash in vault as of the starting point, December 31, 1944. This was based on appellant's statements to Ringo that he had $75,000 cash in a vault on December 31, 1941, which had been decreased by December 31, 1944, by withdrawals of $10,000 deposited to his personal account and $15,000 used to create three trustee accounts of $5,000 each for three children. (R. 158-168, 243-245, 295-296, 427-429, Ex. 17, 18, 19, 21.)

Also included as an asset at the end of 1945 was cashier's check No. 25104696 for $7,724 payable to the Army-Navy Store, bearing appellant's endorsement. (R. 420, Ex. 34.) This check was purchased on November 19, 1945 and was outstanding at the end of the year, being paid by the bank on March 27, 1946. (R. 338-341.)

Also included in appellant's assets were United States Treasury bonds 2½% 1959-62 series, purchased by him for $25,000 in 1945 and in appellant's possession at the end of each year 1945 and 1946. (R. 425.) Appellant claimed $20,000 of these bonds to be the property of his mother, who died in 1951 prior to the first trial. (R. 221-222, 457, 732-745.) He reported the interest on these bonds in his 1947 tax return. (R. 744.) He was unable to state whether the interest of $1,720.17 reported on his 1946 tax return included the amount received for the bonds in question. (R. 744-745; 835-837.)

Whiteside testified that he had attempted to ascertain the ownership of the bonds by analysis of the mother's bank accounts, and could find no transfer of

any funds previous to the date of the purchase of the bonds in an amount sufficient to account for the $20,000 appellant alleged he had received from his mother and used to purchase the bonds. (R. 483-484.) The bonds were purchased with cashier's checks, which in turn were purchased by appellant with currency. (R. 484-485.)

Appellant's sister, Terrance Olender Gambord Glick, who was co-executor with appellant of the mother's estate, filed a Federal Estate Tax Return on December 15, 1952 in which was itemized stocks and bonds belonging to the estate. The $20,000 in government bonds was not included in the inventory. (R. 485-490, 552, 813-814, Ex. 52.)[6] When first questioned by Agent Root, appellant said the money for purchase of the bonds was from earnings of the Army-Navy Store. (R. 98-99.)

It was stipulated that appellant had non-deductible personal expenses (exclusive of income taxes paid) of $2,739.38 during 1945 and $6,659.07 during 1946. (R. 140, Ex. 11, 11a.) Other expenditures, primarily clothing, were established at trial of $125.49 for 1945 and $4,335.04 for 1946. (Ex. 50.) Thus the total of his living expenses included in the final net worth computation was 1945—$2,864.87; 1946—$10,994.11. Considering the scale on which appellant lived, these

[6]Even assuming that the $20,000 in bonds was the property of appellant's mother, his 1945 tax liability would have been $16,484.71 as compared with the $7,931.86 he reported, or a difference of $8,552.85. Appellant's wife's tax liability, likewise, would be the difference between $7,563.89 reported and $16,044.62 owed. Together their unreported tax was $17,033.58 after crediting the $20,000 as being the mother's property. (R. 481-482.)

amounts are purely nominal. (R. 355, 382-389, 688.) An insurance policy taken out in 1946 carried a personal property floater with coverage of $64,850. (R. 352-355.)

Treasury Currency Reports, made by the Bank of America, Oakland main office, reflected currency transactions with appellant as follows (R. 310-312, Ex. 29):

November 9, 1945 a check for $25,000 was cashed and currency given of 250 $100 bills;

November 20, 1945 a deposit of $25,000 consisting of 250 $100 bills;

December 5, 1945 two cashier's checks for $10,000 and $15,000 respectively, purchased with currency. (Used to purchase war bonds.)

January 14, 1946 $50,000 in currency used to purchase war bonds;

May 29, 1946 a cashier's check purchased with $3000 currency;

September 19, 1946 cash deposits of $1000 in $100 bills and $1,500 in $20 bills.

In addition, the record is replete with evidence of cash dealings of various sorts. (e.g. R. 319, 325, 466-468, 668, 678.)

Whiteside testified that the only "leads" or information given by appellant during the course of the investigation was the information contained on the net worth statement. In the course of verifying this information he learned of additional assets not disclosed by appellant; and included them in his statement, and

ıe followed all leads as to the sources of his income ınd the items of assets and liabilities. (R. 404-409.)

Whiteside also explained the manner of prepara- ion of the net worth statement (Ex. 50) and the ources of the items listed thereon. (R. 412-442.) With he exception of the items objected to by appellant, uestionable or non-provable adjustments were made n appellant's favor. (e.g. R. 413, 416-418, 420-421, 41-442.) For example, the living expense figures in- lude less than $300 a year for food. (R. 434.)

Appellant's net worth as of December 31, 1944 was hus computed to be $198,905.09, and at end of 1946 o be $283,193.62. (R. 431.) Upon the basis of the ıet worth increase plus nondeductible expenditures, ıppellant's true income was computed, as follows (R. 31-437):[7]

Year	Net Income	Reported	Unreported
945	$87,999.24	$41,067.61	$46,931.63
946	43,212.53	23,514.62	19,697.91

The defense: The object of the defense was to show hat the government's net worth computation was in rror:

(a) by failing to credit him as of December 31, 1944 vith over $70,000 cash in vault at the end of 1944, nstead of the $50,000 claimed by the government;

(b) by failing to credit him as of December 31, 1944 vith sailor suits costing $20,550, on hand at the end

[7]Since appellant's returns were filed on the community property basis, these figures should approximately be halved for the purpose of the indictment.

of 1944, but not included in store inventory, and sold in 1945 and 1946;

(c) by including in his assets as of December 31, 1945 and 1946 bonds costing $20,000 in 1945, which he was holding for his mother; and

(d) by including in his assets as of December 31, 1945 a cashier's check for $7,724 purchased in 1945 and cashed in 1946.

(a) *The currency on hand.*—Appellant testified that in April, 1944 he and his attorney, Monroe Friedman, visited his safe deposit box No. 56 and arranged for Friedman's name to be recorded with the bank as a joint tenant so he would have access to the box during appellant's absence on a trip to San Antonio, Texas. At that time appellant counted the money, consisting of mostly $100 bills, and there was $75,000 in currency in the box. (R. 569-573.) He did not keep a record of currency in the vault, and could not recall any having been made on this occasion; nor could he recall the amount in the box in January, 1944, when he had removed $20,550 to purchase the Goodman cashier's checks. (R. 669-700.) Appellant testified he had the money in the box since 1942, when he had put in at least $75,000 which he obtained in currency from his father between 1930 and 1940. (R. 700-701, 707, 708.) $45,000 of the sum was in gifts. (R. 708, 726.) Appellant's father died on June 18, 1940. (R. 709.) Prior to 1942 appellant had kept the cash in a vault and safe in the Olender Building in Fresno. (R. 708.) Appellant's mother was executor of the father's estate,

and knew of the gifts. (R. 708.) Appellant also did some work in connection with the estate tax return filed for his father's estate and admitted that none of the $75,000 was reported thereon as a transfer during decedent's life. (R. 711.) Appellant prepared his father's tax returns from 1930 to 1940 (R. 725-726) and knew his father was borrowing money in that period. (R. 727.)

Appellant said he used none of the $75,000 in 1942 or 1943. (R. 711-712.) In 1944 he removed $20,550 in January to purchase the Goodman checks; $1,500 on June 27 for deposit to his personal bank account; $1,500 on July 17 for deposit to the Olender-Alkus bank account; $3,000 in December to purchase merchandise from Barney's in Los Angeles; and $8,000 for purchase of Treasury bonds on December 16, 1944 might have come from the vault since appellant's bank accounts showed no such withdrawal. (R. 712-714.)[8]

He claimed over $70,000 in the safe deposit box at the end of 1944. He kept no record and could not explain how he fixed this figure, but he "just knew it was there." (R. 715.) He could not remember the amount on hand at the end of 1945 and said it was all gone at the end of 1946. (R. 715-716.) Later he said there was cash on hand at the end of 1946, but he did not know how much. (R. 718.)

He identified his handwriting on Exhibits 17, 18 and 21 in which lesser amounts of currency are

[8]Even assuming $75,000 on hand in April, 1944, the subsequent withdrawals reduce the amount during the year by $14,000.

claimed, but could not remember the last document (Ex. 21), or explain where the figures of lesser cash on hand originated. (R. 717-723.)

He did not report the currency in his declarations of personal property tax filed with Alameda County Assessor during 1941 through 1946. (R. 728.)

Monroe Friedman testified that he had accompanied appellant to the bank on April 22, 1944 to place the safe deposit box in their joint names, and that appellant had counted the currency and it amounted to two or three hundred dollars more than $70,000. (R. 500-503.) On May 5, 1944 Friedman's name was removed from the record of ownership of the safe deposit box and the box was looked at, but the money was not counted. (R. 503.)

(b) *The sailor suits:*—In January, 1944 appellant purchased with currency a series of cashier's checks totaling $20,550 and made payable to George Goodman.[9] (R. 55, 585.) He gave or mailed the checks to Louis Leavy[10] to buy small size sailor suits in lots of 100 at $22.50 or $23.50 each from Goodman. (R. 585-588.) In January, February and March, 1944 appellant received approximately 822 sailor suits in cartons marked "Seagoing Uniform Company," and when opened he discovered that the suits were mismarked as to size. (R. 588-590.) He complained to Leavy that he could not sell the suits because they were large sizes, and he put them in his basement. (R. 590-591.) The

[9]Goodman was dead at the time of the trial (R. 848).

[10]Sometimes spelled Levie in the record.

822 suits were not included in 1944 year-end inventory. (R. 597.) In 1945 Leavy sold 200 of the suits for appellant to Lerman for $5,000, which was deposited in the store bank account and entered as a capital investment on the books. (R. 591-594.) Later in 1945 Leavy sold an additional 280 suits in small lots for approximately $7,000 which Leavy retained and used to purchase suits for appellant from Moe Suraga in New York. (R. 595-599.)

About 20 suits were sold to individual customers in 1945 and the remaining 322 were taken into inventory at a cost figure of $24.50 each at the end of 1945 and sold in 1946 or later. (R. 595-597, 765.)

On cross-examination appellant admitted he had arrived at the figure of 822 suits by dividing $20,550 by $25 a suit. (R. 750.) Appellant personally counted the goods in inventory at the end of 1944 and 1945. (R. 753-756.) The 822 sailor suits were in basement No. 1. (R. 753.) The 1944 year-end inventory shows a total of 110 sailor suits in the store, and includes a page for items located in basement No. 1, but no sailor suits are recorded in that location. (R. 758-763, Ex. 60.) The 1945 year-end inventory shows 322 suits in basement No. 1 at $24.50 each. (R. 765, Ex. 61.) These suits were not included in the inventory contained in the 1945 tax return. (R. 774.) The 1946 year-end inventory showed 44 sailor suits on hand, so that the 322 suits had been largely disposed of in that year. (R. 776.)

Leavy corroborated appellant's story to some extent, but admitted that the invoice he sent to Lerman with

the 200 suits showed they mere mostly *small* sizes. (R. 870-871, Ex. 53.)

(c) *The Ownership of $20,000 U. S. Government Bonds:*—Appellant testified that he purchased $25,000 of U. S. Government 2¼, 59-62 bearer bonds on December 5, 1945, of which $20,000 belonged to his mother. (R. 555.) He retained possession of them until he ordered their sale in 1953. (R. 565.) In 1947 he reported the interest from them on his income tax return. (R. 569, 744.) He clipped the interest coupons. (R. 736.) He ordered the sale of the bonds. (R. 736.) The money used to purchase the bonds was given to him at different times, $10,000 in July, 1944 and the balance of $10,000 in one or two other occasions later in 1944 or early 1945 or before November or December 1945. (R. 732-733.) The money was given to him to use any way that he desired. (R. 734.) The bonds bore no identification as to ownership, but were placed in an envelope with the mother's name on it. (R. 735-736.)

(d) *The Cashier's Check for $7,724:*—This check (Ex. 34) was drawn payable to the Army & Navy Store, endorsed by Army & Navy Store, M. Olender, to the order of Louis Leavy; then endorsed again "M. Olender," then "Louis Leavy" and finally "M. Saraga." The check had its origin in the sale of 280 sailor suits by Leavy to various unnamed customers, the proceeds of which sales Leavy had taken to New York to use for purchase of additional suits for appellant. (R. 795.)

Appellant admitted that if he did not have the check n his possession at the end of 1945 he had an account eceivable from Leavy or a deposit in an advance with araga. (R. 795-796.) He "assumed" it was an asset t the end of 1945. (R. 796.)

THE GOVERNMENT'S REBUTTAL.

Appellant testified repeatedly that he had received nly 822 sailor suits from Goodman in 1944 in exhange for the $20,550 cashier's checks (R. 585, 750, 57); and that the shipments were received in Janary, February and March, although there could have een some a little later, a month or two. (R. 750.) Ie also testified that the suits were marked with small izes, but were actually large sizes that he could not ell. (R. 588-589.) He identified the suits as coming rom Seagoing Uniform Corporation. (R. 751.)

In rebuttal, John Sanchirico, executive vice-presient of Seagoing Uniform Corporation since 1940 and ccountant for the firm prior thereto, produced and dentified invoices and shipping memorandums kept y the company in the regular course of its business. R. 889-899, Ex. 66-71.) He explained that in 1944 nd 1945 Goodman supplied cloth for uniforms, and hat Seagoing did the manufacturing, with each party etting one-half of the finished product. (R. 872-893.) Goodman's share of the finished product was shipped rom Seagoing's plant, pursuant to Goodman's instructions. (R. 895.) Goodman furnished the shipping abels indicating the consignee. (R. 895, 911.)

Seagoing's employees hand wrote a shipping memorandum indicating the number of garments involved, and the name and address of the customer, at the time the goods were shipped. (R. 895.) The shipping memorandums show a total of 933 suits shipped in the first six months of 1944. (R. 896-903.) Of this total, 430 were shipped in June. (Ex. 69, 70, 71.)

The greatest range in sizes was from size 36 to 44 during 1944, and sailor suits were in great demand in any size. (R. 903-904.)

SUMMARY OF ARGUMENT.

I.

The evidence adduced by the government was manifestly sufficient to support the verdict of guilty. What appellant asks is that this court reweigh the evidence and accept as true his own largely uncorroborated testimony. It is well settled this court will view the evidence in the record in the light most favorable to the government, and that it will not judge the credibility of witnesses or reweigh the evidence.

II.

The rebuttal testimony of John Sanchirico and admission of the exhibits he identified and introduced, was proper to impeach appellant on a material issue in the case, and the records were admissible as allowed by this exception to the hearsay rule, and pursuant to Title 28 United States Code, Section 1732.

ARGUMENT.

I.

THE EVIDENCE WAS AMPLY SUFFICIENT TO SUPPORT THE VERDICT AS TO EACH COUNT.

A. Scope of Appellate Review of Sufficiency of Evidence.

Appellant contends that the evidence was insufficient to support the verdict.[11] Actually what he asks is that this court review the evidence and accept as true his own largely uncorroborated testimony.

It is a well established principle that this court will indulge in all reasonable presumptions in support of the ruling of the trial court, and, therefore, will resolve all reasonable intendments in support of a verdict in a criminal case. In determining whether the evidence is sufficient to sustain a conviction, it will consider that evidence in the light most favorable to the prosecution.

Henderson v. United States, 143 F. 2d 681 (C.C.A. 9th);

Pasadena Research Laboratories v. United States, 169 F. 2d 375 (C.C.A. 9th), certiorari denied, 335 U.S. 853, 69 S. Ct. 83;

Norwitt v. United States, 195 F. 2d 127 (C.C.A. 9th);

Bell v. United States, 185 F. 2d 302, 308 (C.C.A. 4th);

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[11]In this section we deal with appellant's first five Specifications of Error (Br. 56-59) and the first two points of his argument. (Br. 59-84.)

Gendelman v. United States, 191 F. 2d 993 (C.C.A. 9th);

Barcott v. United States, 169 F. 2d 929, 931 (C.C.A. 9th), cert. denied 336 U.S. 912.

The proof in a criminal case need not exclude all possible doubt, but need go no further than reach that degree of probability where the general experience of men suggests that it is past the mark of reasonable doubt.

Henderson v. United States, 143 F. 2d 681 (C.C.A. 9th);

Pasadena Research Laboratories v. United States, 169 F. 2d 375 (C.C.A. 9th) certiorari denied, 335 U.S. 853, 69 S. Ct. 83;

Norwitt v. United States, 195 F. 2d 127 (C.C.A. 9th).

The measure of reasonable doubt is generally said not to apply to specific detailed facts but only to the whole issue. Wigmore on Evidence (3d ed. 1940), Vol. IX, Sec. 2497, p. 324.

An appellate court is not concerned with the weight of the evidence. All questions of credibility are matters for determination by the trial court.

Gage v. United States, 167 F. 2d 122, 124 (C.C.A. 9th);

Pasadena Research Laboratories v. United States, 169 F. 2d 375 (C.C.A. 9th) certiorari denied, 335 U.S. 853, 69 S. Ct. 83;

United States v. Socony-Vacuum Oil Company, 310 U.S. 150, 254;

Gendelman v. United States, 191 F. 2d 993 (C.C.A. 9th);

C-O-Two Fire Equipment Co. v. United States, 197 F. 2d 489, 491 (C.C.A. 9th).

Despite these well settled principles of appellate review, appellant's first points of argument (Br. 59-84) are little more than a recital of testimony by defense witnesses in the light most favorable to the defense. The thrust of his argument is directed at the claim that the opening and closing net worth for each year was not established to a reasonable certainty, or in the alternative, that it failed to reflect unreported income. (Br. 59, 78, 83.)[12] Cf. *Campodonico v. United States,* 222 F. 2d 310 (C.A. 9th).

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[12]Appellant also suggests in passing, although he apparently does not rely upon the claims: (a) that the government failed to follow leads supplied by him as to cash on hand (Br. 65, 80); (b) that there was no proof of a likely source from which it could reasonably be found the net worth increases were derived. (R. 79.)

As to (a) supra, the first knowledge to the government that he disavowed the $50,000 cash figure and claimed $70,000 cash as of December 31, 1944, came at the first trial of this case. (R. 463.) Obviously, this is not the kind of lead which *Holland v. United States,* 348 U.S. 121 requires to be investigated. Otherwise, a trial must be adjourned each time a defendant testifies in his own behalf in order that the truth of his statements may be verified or disproved. The Supreme Court makes it clear that where relevant leads are not forthcoming, or the leads are not reasonably susceptible of being checked, the government is under no duty to negate every possible source of non-taxable income. *Holland v. United States,* supra, at pages 135-136. Moreover, the trial court fully instructed the jury as to the effect of the government's alleged failure to run down leads. (R. 936-937.)

As to (b) supra, *likely* sources *were* proved at the trial. The Army and Navy store business and the unrecorded deals in uniforms were themselves sufficient to meet this requirement even without regard to the various other business interests of appellant. In any event, the *Holland* case does not require the precise

B. The Evidence of Net Worth Increases.

To convict one of tax evasion under Section 145(b), the Goverment must prove that there is a tax owed to it by the defendant and that he has done acts of evasion with a specific intent to defraud the United States. Here there is no question that acts of evasion were done. The sole issue is whether the appellant owed a tax to the United States.

The argument that the extensive evidence, including stipulations, of the appellant's financial affairs, is too insufficient to establish his net worth increases brings into sharp focus the effort to show ultimately that tax evasion must be immune against detection and proof by circumstantial evidence.

Bizarre on its face (though to be sure, not impossible), appellant's belated story that he had $70,000 in hidden cash on December 31, 1944 was obviously not subject to disproof by direct evidence. The investigators could not reach back in time to inventory the contents of his vaults and safe deposit boxes. Now appellant asserts that his tardy assurances that he had larger sums of money than originally claimed should be sufficient to destroy the effectiveness of the government's proof. If the argument were sound, a large number of tax investigations and trials would begin

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sources to be shown. It is sufficient if there was proof from which the jury could reasonably find the net worth increases sprang. This court stated in *McFee v. United States* (C.A. 9th 1953), 206 F. 2d 872, 874, cert. denied, 347 U.S. 927, order denying certiorari vacated 347 U.S. 1007. "The law is clear that proof of the exact amount or precise source of unreported income is not required." *Jelaza v. United States* (C.C.A. 4th 1950), 179 F.2d 202; *Gariepy v. United States* (C.C.A. 6th 1951), 189 F.2d 459.

nd end with the taxpayer's bland claim of bags of oarded currency from some convenient time in the ast.

That the argument is unsound is attested by the reat number of cases in which evidence of the kind dduced here has served as a part of the Government's ase.[13]

We submit that the Government's evidence mani-estly supports the net worth computations and the erdict of guilt. Appellant's large unrecorded deals ith Goodman justify the use of the net worth method f computing taxable income for the years involved. Moreover, the Goodman deals (shown by Sanchirico's estimony to have been greater than what appellant dmitted) considered in conjunction with the use of ashier's checks and currency, indicated a probable lack market source for the unreported income. Cf. *Inited States v. Chapman,* 168 F. 2d 997, 1000 (C.A.) cert. denied, 335 U.S. 853.

The items in the net worth statement (Ex. 50), in-luding the annual inventories of merchandise in the tore, were derived largely from the stipulations. (Ex. 1-11A.) In addition, the government, relying on appel-ant's admissions to Ringo in the early stages of the

[13]E.g., *Smith v. United States,* 210 F.2d 496, 500 (C.A. 1), cer-iorari granted, 347 U.S. 1010; *Pollock v. United States,* 202 F.2d 281, 284 (C.A. 5), certiorari denied, 345 U.S. 993; *Fariepy v. United States,* 189 F.2d 459, 461-462 (C.A. 6); *Inited States v. Potson,* 171 F.2d 495, 498 (C.A. 7); *Schuer-ann v. United States,* 174 F.2d 397, 399 (C.A. 8), certiorari enied, 338 U.S. 831; *Barcott v. United States,* 169 F.2d 929, 931-32 (C.A. 9), certiorari denied, 336 U.S. 912; *Graves v. United tates,* 192 F.2d 579, 584 (C.A. 10).

case, allowed $50,000 cash in the safe deposit boxes as of December 31, 1944 (R. 427-429, Ex. 10, 17, 18, 19, 21) of December 31, 1944 (R. 427-429, Ex. 10, 17, 18, 19, 21); and the government charged appellant with ownership of the $20,000 in Treasury Bonds which were in his possession in 1945, on which he reported the interest in his 1947 income tax return and over which he exercised control (R. 425);[14] and with ownership of a cashier's check for $7,724 on hand at the end of 1945 and cashed in 1946. (R. 420.)

Assuming $50,000 cash at the starting point, the government's computation establishes unreported income of $46,931.63 for 1945 and $19,697.91 for 1946. The trial judge, however, instructed the jury. (R. 926-927):

> "In many net worth cases the government relies on the taxpayer's statements made during the course of a government investigation in order to establish vital links in the government's case. Sometimes these statements are made by a taxpayer more concerned with a quick settlement than an honest search for the truth. In order to safeguard the defendant, the law requires that these statements relating to vital links in the gov-

[14]Appellant's 1946 income tax return reported interest income of $1,720.17 from bonds—an amount sufficient to include the interest on the $20,000 Treasury bonds in question. He was unable to explain how he arrived at this interest figure, although he prepared his own return, and he had no work sheet to show his computations. (R. 744-745, 830, Ex. 3.) Unless appellant had additional income during 1946 the only source from which a large portion of this bond interest could be derived was the Treasury bonds he claimed to be his mother's.

ernment's case be corroborated. In this connection, the $50,000 cash item and the $7,200 cash item used by the government in Exhibit 50 cannot be considered by you in determining the opening or closing net worth, because the government did not corroborate that. You can use, however, whatever amounts the defendant said he had while he was on the witness stand here under oath."

The effect of this instruction was to remove from the jury's consideration the $50,000 cash on hand figure for December 31, 1944 and substitute the appellant's judicial admission of $70,000. (R. 715.) We believe the court erred in so instructing the jury, since it overlooked the fact that there was ample corroboration of the *corpus delicti* in the fact that the appellant was enjoying excessive net worth increases during the prosecution years at the same time he was receiving unrecorded amounts of income. *Smith v. United States,* 348 U.S. 147; *United States v. Calderon,* 348 U.S. 160. The instruction was, therefore, more favorable to appellant than he deserved.

While the Supreme Court in *Smith v. United States,* supra, at page 156 speaks of the requirement of corroboration for all "elements of the offenses established by admissions alone", nowhere does it appear to require corroboration of each individual entry on an incriminating net worth statement. The amount of currency on hand is not an element of the offense to be established by independent evidence or corroborating admissions, any more than the value of other assets claimed by appellant on the same document and

adopted by the government as true without independent corroboration and which remain unchallenged.[15]

It must be assumed the jury followed the instructions of the court and credited appellant with $70,000 at the end of 1944, rather than $50,000. Since some $46,000 unreported income remained (even without regard to whatever amount of cash on hand appellant admitted having as of the end of 1946) and since the opening cash on hand was clearly fixed by judicial admission, there was substantial evidence of tax evasion. This court "can seek corroborative evidence in the proof of both parties where, as in this case, the defendant introduces evidence in his own behalf after his motion for judgment of acquittal has been overruled". *United States v. Calderon,* supra, p. 164. The Supreme Court in the *Calderon* case, in almost identical circumstances of dispute as to the defendant's conflicting claim of cash on hand, went on to say:

> "Even more conclusive corroboration, however, is respondent's testimony at the trial that he had $16,000 or $17,000 cash on hand at the starting point. This conflicted with the statements being corroborated ($500) and respondent's testimony at a prior trial ($2000 to $9000), but for the purpose of independently establishing the crime charged the jury could accept this testimony. Respondent further testified that he had $3,000 or $4,000 in cash at the end of the prosecution period. Taken together with the remainder of

[15]For example, cash in store register of $2,500 at the end of 1944 and reduced to $1,000 by the end of 1945; valuation of household furniture, value of real estate, and amount of nondeductible expenditures. (Ex. 50.)

the net worth statement, which was stipulated or independently established, this testimony establishes a deficiency in reported income of more than $30,000 (footnote omitted). There could hardly be more conclusive independent evidence of the crime."

Moreover, as this court properly pointed out in *Wendelman v. United States,* 191 F. 2d 993:

"While the government had the duty to prove guilt beyond a reasonable doubt, it was not required to prove the exact amounts of unreported income. Skillful concealment can not be made an invincible barrier to proof. *United States v. Johnson,* 1943, 319 U.S. 503, 517. Proof of the amounts of the appellant's income need not measure up to the amount stated in the indictment. *Gleckman v. United States,* 8 Cir. 1935, 80 F. 2d 394, certiorari denied 297 U.S. 709. What is necessary to take a case of this kind to the jury is a showing that a taxpayer had income which he deliberately failed to include in his return. *Schuermann v. United States,* supra, at page 399. Whether such a showing had been made at the close of the government's case was to a great extent dependent upon the credibility of the government's witnesses."

The independent evidence, the stipulation and the ppellant's judicial admissions, taken together estab- sh a substantial deficiency. Assuming a criminal in- ent to evade tax, which appellant does not deny, that s all that is necessary to support the government's ase.

Appellant goes on, however, to attack the weight f the evidence as to other assets included in the

computations. To be sure, the testimony concerning the ownership of the $20,000 worth of government bonds was in conflict. The evidence produced to establish appellant's purchase, possession and control of the bonds was ample to justify the jury in finding that they were his property. He purchased them with cashier's checks, which in turn had been purchased with currency. (R. 555, 733-736.) They were in his possession during all of the period from purchase to sale. (R. 565.) He clipped the interest coupons. (R. 736.) He reported the interest earned on these bonds in his 1947 tax return (R. 569, 744) and there is some justification for believing that he likewise reported the interest in his 1946 return. (See footnote 14 supra.) When the bonds were sold he gave the order of sale. (R. 736.) The bonds were not reported on the estate tax return filed by appellant's sister, who was co-executor with him of the mother's estate. (R. 740-742.) Subsequent to the first trial appellant filed a supplemental inventory in which the $20,000 in bonds was disclosed for estate tax purposes for the first time. (R. 740-741.) (Ex. P.)

The critical issue was appellant's credibility and the jury having determined this issue against him, he seeks a reweighing of the evidence by this court.

Likewise, the number and value of sailor suits on hand at the end of 1944 and 1945 is challenged by appellant. The inventory records of appellant's business at the end of each year, 1944, 1945 and 1946 were made by him personally. (R. 753-756.) He concedes that the 822 suits he claimed on hand in

basement No. 1 were not included in the 1944 year-end inventory. (R. 597.) He claimed that the suits were unsaleable because they were large sizes. (R. 588.) Nevertheless, he states that 322 suits of this nature were taken in inventory at the end of 1945 and he had no difficulty in selling most of them in 1946. (R. 597.) Leavy sold approximately 480 of these suits in 1945 for around $12,000 which was not recorded as income on appellant's books, the first $5,000 being shown as a capital investment by appellant (R. 594), and the remaining $7,000 being retained by Leavy and used for the purchase of other merchandise from Suraga. (R. 595-599.) Leavy kept the proceeds of these latter sales over a period of several months and was unable to remember the names of any of the customers purchasing them. (R. 875-878.)

Once more, the critical issue was the credibility of the defense witnesses and there was ample evidence to justify the jury's rejection of the appellant's claim.

Appellant also objects to inclusion in his net worth at the end of 1945 of a cashier's check for $7,724. (Exhibit 34.) The check was issued on November 19, 1945 to the Army and Navy Store and was not cashed until March 27, 1946. Appellant admitted that he was entitled to the proceeds of the check and that he eventually received the benefit of it in 1946. The check was included as an asset since it constituted either cash or an account receivable at the end of 1945. (R. 420.) However, even it be assumed *ar-*

guendo that appellant's contention concerning this check is correct, the amount involved could not affect the result. An income and tax liability would remain outstanding even if the check be eliminated from the net worth statement. "The government is not required to prove the defendant's guilt to a mathematical certainty." *Schuermann v. United States,* 174 F. 2d 397 (8th C.A. 1949) quoted by this court with approval in *McFee v. United States,* 206 F. 2d 872.

There can be no doubt that there was evidence that appellant owned the $20,000 worth of bonds; that he had no sailor suits in basement No. 1 on December 31, 1944; that he had insufficient cash on hand to account for his net worth increases; and that his net worth plus expenditures amounted to more than his reported income in the prosecution years. And "when, as here, there is an evidentiary basis for the jury's verdict, the jury is free to discard or disbelieve whatever facts are inconsistent with its conclusion. And the appellate court's function is exhausted when that evidentiary basis becomes apparent, it being immaterial that the court might draw a contrary inference or feel that another conclusion is more reasonable". *Lavender v. Kurn,* 327 U.S. 645, 653, quoted in *Shebley v. United States,* 9th Cir., No. 14,465, decided March 19, 1956.

This court recently disposed of a similar claim of insufficiency of evidence in the tax evasion case of *Elwert v. United States,* No. 14,846, decided March 22, 1956, in the following language:

"Here, as in most tax evasion cases, much of the Government's evidence is circumstantial. The trial judge must grant a motion for acquittal where the evidence of guilt is circumstantial only if, as a matter of law, reasonable minds as triers of fact must be in agreement that reasonable hypothesis other than guilt could be drawn from the evidence.[5] If, under this test, the case was properly submitted to the jury, its decision will be final. Unlike the practice in some circuits,[6] this court applies no special rule to review circumstantial evidence on appeal as to circumstantial proof of intent see this court's in banc decision in McCoy v. United States, 169 F.2d 776 (Cir. 9), cert. denied 335 U.S. 898 (1948)." (Footnotes omitted.)

ıe motion for judgment of acquittal was properly ənied at the close of the evidence, and there was subantial evidence on which the jury could base its rdict of guilty.

Net Worth Increases in 1946.

In point two of his argument (Br. 83) appellant ntends that the failure to prove the opening net ɔrth on December 31, 1944 to a reasonable certainty, ıd the elimination of the $7,200 cash on hand figure the end of 1945, renders the computations as to 46, on which counts three and four are based, infinite, uncertain and insufficient to establish the arges.

Assuming $70,000 cash on hand at the end of 1944, e net income understatement for that year still gregates approximately $26,900 and leaves no cash

in the box at the end of 1945. To the extent that cash remained on hand at the end of 1945, the understatement of income during the year is increased, for if the increase in net worth did not come from cash on hand it must be from current earnings. Conversely, if appellant had no cash on hand at the end of 1945, the computations of the government allow him the undeserved advantage of the $7,200 originally claimed by him. In other words, the cash on hand in the largest amount ever claimed by appellant is completely absorbed by his understatement of income in the first prosecution year, 1945, leaving him with a zero balance at the beginning of 1946. The jury was justified in considering this prospect in the light of the evidence of net worth increases during the period. Again, to the extent that he had remaining cash at the end of 1946 his net income is greater than charged, for he is assumed by the government's computations to have exhausted his hoard.

The Supreme Court disposed of a similar situation in the *Calderon* case, supra. There the defendant claimed at the trial he had $16,000 or $17,000 cash on hand at the starting point. Even accepting his testimony, a deficiency of $30,747 remained. After holding that the defendant's testimony could be taken together with the remainder of the net worth statement to establish a deficiency and supply the needed corroboration, the court went on to say at page 168:

> "But one problem remains. The $17,000 hoard of cash could have absorbed the computed income deficiency for one or more of the prosecution years, and respondent was convicted on all

four counts. It might be argued that independent evidence showing a $30,000 deficiency is not enough—that there must be evidence that this sum resulted in a deficiency for *each* of the years here in issue. There is no merit in this contention. In the first place, this evidence is merely *corroborating* respondent's cash-on-hand admissions and need not comply with the niceties of the annual accounting concept. While the evidence as a whole must show a deficiency for each of the prosecution years, the corroborative evidence suffices if it shows a substantial deficiency for the over-all prosecution period. Independent evidence that respondent understated his income by $30,000 in the same four-year period for which respondent's extrajudicial admissions tended to show a $46,000 deficiency is adequate corroboration. It provides substantial evidence that the crime or crimes of tax evasion have been committed; the corroboration rule requires no more."

The facts here are even less favorable to appellant ıan in the *Calderon* case, for there the cash on hand ɔuld have absorbed the computed income deficiency, 'hereas in the case at bar the computed income deciency in the first prosecution year absorbs all the lleged cash on hand and an understatement of inɔme still remains.

II. THE REBUTTAL TESTIMONY OF JOHN SANCHIRICO WAS PROPERLY ADMITTED.

One of the critical factual issues in the case was the umber of sailor suits sold by appellant. His claim

of 822 sailor suits unrecorded in his inventory would, if true, entitle him to the same credit for these undisclosed assets as if he had undisclosed currency. In order to impeach his credibility and to refute the claim that he had only the transactions with Goodman reported by the $20,550 in cashiers' checks, and one later transaction of $1,380 (R. 757-758), Sanchirico was called to testify to transactions involving some 933 sailor suits in the first six months of 1944.

Appellant contends that Sanchirico's testimony and the records produced were hearsay and not proper rebuttal. He cites no authority. The propriety of the evidence as rebuttal testimony to impeach appellant on a central issue appears too clear to require argument. This was contradiction of the appellant on a matter vital to his defense, and was properly allowed as rebuttal testimony.

To be sure, the records produced were hearsay, but they fall within the accepted exception of the hearsay rule relating to shop books kept contemporaneously with the transaction entered, and maintained in the ordinary course of business. While the testimony of Goodman would have been the best evidence, these records were clearly admissible when it was shown that Goodman was dead. (R. 848.) Moreover, any doubt as to the admissibility of such records should be resolved by reference to Section 1732, Title 18, United States Code, making admissible such records when made in the regular course of business.

Arena v. United States (C.A. 9) 226 F. 2d 227, 234.

See also:

Wigmore on Evidence (3d Ed. 1940), Volume V, Section 1530;

Olender v. United States, 210 F. 2d 795 (C.A. 9th);

Finnegan v. United States, 204 F. 2d 105, cert. den. 346 U.S. 821, rehearing denied 346 U.S. 880.

"In reviewing a judgment in an appellate court, ıe burden is on the plaintiff in error to show that ɪror in the admission of testimony was prejudicial. *impson v. United States,* 289 Fed. 188, 191. No ıch showing has been made here." *Ryno v. United tates,* 9th Cir., No. 14,793, decided April 10, 1956.

CONCLUSION.

Appellant was properly convicted on evidence gally admissible and amply sufficient to support the erdict. The judgment of conviction should be af-rmed.

Dated, San Francisco, California,
June 4, 1956.

Respectfully submitted,
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Attorneys for Appellee.

No. 14,916

IN THE

United States Court of Appeals

For the Ninth Circuit

MILTON H. OLENDER,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

On Appeal from the United States District Court for the Northern District of California.

APPELLANT'S CLOSING BRIEF.

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APPELLANT'S CLOSING BRIEF.

The argument of appellee consists of a statement of generalities by which it is sought to create a suspicion of guilt and on such suspicion uphold the judgment of the District Court. Nowhere do we find a mathematical computation which results in the establishment of either opening or closing net worths to a reasonable or any degree of certainty.

Appellee has not discussed the recent cases set forth in our opening brief.

APPELLEE'S STATEMENT OF THE CASE IS INACCURATE AND MISLEADING.

We here set forth, with references to the pages in appellee's brief, many misleading statements and inaccuracies in appellee's statement of the case:

(1) On page 5, it is alleged that appellant is a graduate of the University of California where he studied accounting and auditing. The record (R. 630) discloses that Olender graduated from the university in 1918 where he did study elementary accounting, cost accounting and auditing; that since his graduation in 1918, appellant has not taken any further courses or studies in economics, banking, accounting or auditing (R. 841).

(2) On page 5, appellee states that when Treasury Agent Blanchard called on appellant in 1947, appellant produced a check payable to George Goodman for $1380, together with an invoice, and said that was the only transaction that he had with Goodman. Blanchard testified that Olender told him that he had done some business with Goodman but didn't know how much (R. 47); that the $1380 transaction was the only transaction with the Goodman Agency that Olender could find; that Olender may have said it was the only transaction Olender was able to complete directly with the George Goodman Agency (R. 70). At all times from the beginning of the Government's investigation Olender identified his signatures on the six cashier's checks payable to Goodman totalling $20,550 and the applications therefor. Treasury Agent Root so testified (R. 121) as did Agent Blanchard (R. 88-91).

(3) On page 7, appellee refers to Ringo's summary of information given to him by Olender showing cash in vault at the end of 1941, '42, '43, '44 and '45. (U.S. Ex. 19.) Ringo testified these figures were merely Olender's estimates from his recollection (R. 245-6); that he, Ringo, had told the Government agents a number of times that

the figures on Ex. 19 were guesses all the way through and the exhibit was merely work papers used in an attempt to refresh Olender's memory and that he had rejected the figures (R. 268).[1] Ringo also stated that in 1948 Monroe Friedman told him of the $70,000 in safe deposit. (R. 257-9).

(4) On page 7, appellee states that Olender asked Ringo to leave the Asturias stock off the net worth statement. Appellee fails to add that Olender then told Ringo that the stock was valueless. (R. 189.) Olender testified that as a director of the company he considered the stock of no value. (R. 618-619); Defendant's Ex. "U" is a determination by the Internal Revenue Department that the stock became valueless in October, 1947; Ringo was not employed to make a net worth statement until 1948; George Horne, accountant for the Asturias Corporation, testified that he could not fix the date the stock became worthless and that he did not know whether on December 31, 1946 the assets of the corporation exceeded the liabilities (R. 333-4).

(5) On page 8, appellee in discussing the gifts of money from appellant's mother states that on the dates of the claimed gifts all the withdrawals from the mother's *Fresno* bank accounts were traced into other accounts of

[1]In footnote 2 appellee states that these figures in Ex. 19, the Government used in its computations in U.S. Ex. 50; actually the Government only used the amount of $50,000 at end of 1944 and $7200 at end of 1945. The trial Court ruled that these figures could not be used by the Government as they were not corroborated by independent evidence. Under the doctrine of *Holland v. U. S.*, 348 U.S. 121, none of the figures on Ex. 19 could be used as none were corroborated by independent testimony.

the mother or the account of appellant's sister. This refers to the testimony of Mr. Coffman relative to accounts in *Bank of America* at Fresno (R. 367-381) and is set forth in our opening brief at page 21.

The net worth statement (U.S. Ev. 10) lists these gifts as follows: February 3, 1942, $1000; March 31, 1943, $1000; January 6, 1944, $2000; July 5, 1944, $2500; December 15, 1944, $1000; January 2, 1945, $3000.

Coffman testified that Mrs. Olender withdrew $1000 in cash on March 24, 1942 (R. 391); that on June 29, 1944, Mrs. Olender withdrew $3000 (R. 380); that the withdrawal slip has a notation for "Bonds", but whether the money was used for the bonds the witness could not state (R. 394).

Olender testified he went to Fresno where his mother told him the times she thought she had withdrawn money from the bank and given it to him (R. 643); that he did not go to the bank and check the records or dates (R. 342); that to his recollection his mother never gave a gift to his sister without making a like gift to him (R. 644); that his mother also had cash besides her bank deposits and that from whatever place she had it, she took the same amount of cash that she transferred into his sister's account and gave it to him (R. 643).

Defendant's Ex. "Q", a letter from Olender's mother dated July 11, 1944, states (R. 647):

> "Milton dear: As I told you over the phone, I have $7,500 in safe and will get a cashier's check for $2,500 and bring it down with me when I come, which will be on July 21st * * *"

(Note this corresponds with the listing of a $2500 gift in July of 1944.) Olender testified the letter referred to a gift to him of $2500. (R. 649.)

Defendant's Ex. "AK", savings bank book of Molly Olender in the *Securities First National Bank,* Fresno Branch, shows a withdrawal of $2500 on July 5, 1944; this was not testified to by Coffman.

The Government's proof related solely to Mrs. Olender's bank accounts in Fresno. She had other accounts which evidently were not examined by the Government. Thus, on U.S. Ex. 52, the Federal Estate Tax Return, and on Defendant's Ex. "P", the inventory filed in her estate in the California Court, she had a savings account in the Central Bank of Oakland, California, in which, at the time of her death, there was over $8000.

Mrs. Olender the elder and her daughter each had their bank accounts in Fresno. Olender's bank accounts were in Oakland.

(6) On page 8, appellee states that Ringo had some reason to indicate on the net worth statement, U.S. Ex. 10, that $20,000 of the bonds belonged to appellant's mother but that he couldn't remember what it was, and appellee refers to pages 221-2 of the record. Ringo testified that he inventoried the bonds as being those of Olender's mother from what he saw in the safe deposit box (R. 229); that the bonds had some marking showing that they were the mother's bonds (R. 230); that his recollection was that the bonds were in an envelope or in some other form identifying them as a group and there was something on the bonds that indicated they were the bonds of Olender's mother (R. 202-3).

(7) On page 8, appellee states that in the 1947 tax return of Olender, interest of $1225 was reported which would equal the interest on $33,000 of Treasury bonds. Olender testified that in 1947, his mother gave him the interest on her bonds and so he reported it in his 1947 income tax return; that in the years 1946, 1948, 1949, 1950 and 1951 the income on the $20,000 of bonds was reported in his mother's income tax returns (R. 569).

(8) On pages 9 and 10, appellee states that the Government adopted the $50,000 figure as cash in vault on December 31, 1944, by deducting from $75,000 as cash in vault on December 31, 1941, a withdrawal of $10,000 deposited to Olender's personal account and $15,000 used to create the trustee accounts for his three children. However, the record establishes that the trustee accounts for the three children were not opened until November of 1945 (Defendant's Ex. "AA"; R. 625; U. S. Ex. 10) and that the $10,000 was deposited in Olender's personal account in 1945 (Defendant's Exs. "W" and "D"). Thus, the Government, having erroneously deducted $25,000, leaves the amount of cash on hand as of December 31, 1944, in the sum of $75,000.

(9) On page 10, appellee states that the Government included $7724 as an asset at the end of 1945, this being a cashier's check purchased on November 19, 1945 and outstanding at the end of that year. The Government fails to point out that this was the result of a cash disbursement made in 1944. Therefore, this amount must be deducted from the assets at the end of 1945 or an equal amount credited to the opening net worth at the end of 1944.

(10) On page 11, appellee points out that Terrance Gambord Glick, co-executor with appellant of their mother's estate, filed in 1952 a Federal Estate Tax Return which did not list the $20,000 in Government bonds. On the Federal Estate Tax Return (U.S. Ex. 52) there is written in pencil "U. S. Government Bonds 20M". It will be noted that appellant did not sign or file this Federal Estate Tax Return, *which contains pencil notations of other assets.*

Appellee makes no statement of the correspondence between Treasury Agent Reed and Olender in 1946 wherein Olender explains to the Government that on November 20, 1945 he purchased $20,000 of Government bonds for his mother, on written instructions from his mother (R. 560-1), nor is mention made of the letters from Olender's mother relative to the purchase of these bonds (R. 563, 565.)

(11) On page 10, appellee states that Olender "was unable to state whether the interest on $1720.17 reported on his 1946 tax return included the amount received for the bonds in question (the mother's $20,000). (R. 744-745, 835-837.)"

Olender gave no such testimony. On pages R. 744-5, Olender testified merely that he could not determine what amount of bonds produced the interest reported. On pages 835-837 of the record, Olender was testifying as to the sale of $25,000 of his bonds in 1946 (the mother's bonds were not sold until 1953, R. 518); that they were coupon bonds and when sold between interest periods the seller received in addition to the value of the bonds a prorata of the interest as of the date of sale and the previous

interest date. Then Olender, in reply to a question by the prosecutor, emphatically stated that the interest reported in his 1946 return did not include any interest on his mother's $20,000 bonds. (R. 837.)

(12) On page 11, appellee states that when appellant was first questioned by Agent Root he stated that the money for the purchase of the bonds was from earnings of the Army and Navy Store, and appellee refers to pages 98-99 of the record. Beginning with pages 94 to 100 of the record, Agent Root was testifying as to the bond interest reported in Olender's income tax return for the years 1944, 1945 and 1946. The statement on page 98 of the record that the bonds, for which the interest was reported in the income tax returns, had been purchased with funds from the Army and Navy Store, *related only to Olender's bonds.*

(13) On page 15, appellee indulges in some computations as follows: Assuming that Olender had $75,000 in 1943, that in January, 1944 he removed $20,550 to purchase the Goodman checks; that in June he withdrew $1500 for deposit in his personal bank account; in July $1500 for deposit to the Olender-Alkus account; $3000 in December to purchase merchandise from Barney's (in reality only $2160 (Defendant's Ex. "T", R. 616)) and $8000 to purchase Treasury bonds. The Government concedes these sums must have come from his safe deposit box as his bank accounts showed no such withdrawals and then appellee arrives at the figure that there would only have been $61,000 left at the end of 1944; *but this figure is $11,840 higher than the Government seeks to give Olender credit for at the end of 1944.*

Appellee does not credit this cash with at least a $2500 gift from the mother in July, 1944 (see (5) above), which raises this amount to $14,340 more than the Government seeks to give Olender credit for at the end of 1944, making total cash of $64,340.

In using the foregoing computations, appellee fails to take into consideration any of the money that was put into the safe deposit box during this period of time. The evidence shows that interest on bonds, income from the Fresno property and other receipts which were not deposited to Olender's bank accounts went into his safe deposit box.

Agent Whiteside testified that he didn't attempt to compute the differences in cash on any of the pertinent dates because Ringo had testified there were numerous entries into the safe deposit box and no record kept of the moneys going in or out. (R. 464.) Both Olender and Ringo testified that money went in and out of the box. The net worth statement (U.S. Ex. 10) states "during the years 1941-1945, inclusive, there was a constant switching of funds between this cash in vault, personal bank account, etc. . . ."

(14) On page 12, appellee refers to the investigation made by Agent Whiteside. All this refers to what was done by the Government prior to the first trial. New and additional leads were given to the Government at the first trial, none of which were followed by the Government agents prior to the second trial.

(15) On page 12, appellee refers to an insurance policy taken out in 1946 with a coverage of $64,850. The testi-

mony of Foley, the insurance man, was that this policy was a continuation of a prior policy (R. 356), which became effective December 24, 1942 and was renewed in 1943 and again in 1944 (R. 357); that there was no record showing when any of the articles covered by the policy were actually paid for. (R. 360.) That many of the articles covered were added to the policy after December, 1946. (R. 384-387.)

(16) On page 18, appellee discusses the ownership of the $20,000 United States bonds. Appellee makes no mention of the correspondence with Reed in 1946 nor of the letters from Olender's mother to appellant relative to the purchase of these bonds. Appellee does admit that these bonds were placed in an envelope with the mother's name upon it.

(17) On page 18, appellee states that the cashier's check for $7724 had its origin in the sale of 280 sailor suits by Leavy. However, these 280 sailor suits were part of the purchase of the Goodman suits in early 1944. Once again, we have the situation where this amount must be deducted from the net worth at the end of 1945 or a like amount credited to the opening net worth at the end of 1944.

(18) At the bottom of page 17, appellee states that Leavy admitted that the invoice he sent to Lerman with the 200 suits showed they were mostly small sizes. The record shows that Lerman testified that the 200 suits were mismarked and that the suits were much larger than those marked (R. 527-528); that he notified Leavy of the mismarking of the suits (R. 537). Leavy testified that Olender complained to him the suits were mismarked and that

Leavy communicated such fact to Goodman (R. 862); that when he sold the suits to Lerman and made out the invoice, he knew he wasn't shipping the proper sizes but that Lerman had tailors who could fix them; that he didn't tell Lerman the suits weren't properly marked and that Lerman complained to him that the sizes of the suits didn't correspond to the markings (R. 871).

REPLY TO APPELLEE'S ARGUMENT.

As demonstrated above, appellee's statement of the facts of the case contains 18 inaccuracies and misleading statements and on these inaccuracies and misleading statements bases its entire argument. *The premise being erroneous the conclusions drawn by the government are equally erroneous.*

The governments bears a greater burden than merely to throw a mass of figures at a jury and from these figures ask the jury to return guilty verdicts. The Government cannot prevail unless it establishes to a reasonable certainty the opening and closing net worth of any person charged with income tax evasion.

(a) Footnote 12 on Page 23 of Appellee's Brief.

Here appellee states it had no information as to the disavowing of the $50,000 cash figure and the claimed $70,000 cash as of December 31, 1944 until the first trial of the case, and then argues that a trial need not be adjourned to run down such a lead. Such is not the situation here. This was the second trial of the case and, so far as the Government was concerned, it was its duty

to run down all leads of which it had knowledge prior to the second trial, just as if there never had been a first trial.

The appellee argues that *likely* sources of unreported income were proved at the trial. No such proof appears in the record. The $20,550 Goodman transaction was fully explained. This took place in early 1944. The Government established the cashier's checks were purchased with cash, which could only have come from Olender's safe deposit box. Olender testified that as the suits were too large and mismarked he could not sell them as he had no tailoring facilities (R. 588); that he held the entire transaction in suspense pending an attempted adjustment thereof and did not enter the purchase price in his books or include the suits in his inventory (R. 597). Olender did enter the first $5000 received from Leavy as a capital investment (R. 594) and at all times admitted his signatures on the applications for the checks.

If the net worth increases at the end of 1945 could be attributed to the sale of these suits, then Olender must be given credit for the cost thereof at the end of 1944, thus one entry would offset the other. The $20,550 was expended prior to Monroe Friedman seeing the $70,000 in the box in May.

The Sanchirico testimony will be discussed under another heading.

(b) Evidence of Net Worth Increases.

Appellee argues in generalities that the various aspects of the evidence justified the conclusion that Olender had net worth increases in 1945 that were taxable income.

Nowhere does appellee compute the effect of its claimed proof.

Nowhere does appellee attempt to refute the computations set forth in our opening brief; nor to discuss the cases cited by us therein.

In other words, appellee merely indulges in a series of guesses on which it bases its final contention.

On April 12, 1956, the Court of Appeals for the First Circuit decided the case of *Thomas v. Commissioner,* ..... F. 2d ..... (not as yet reported), wherein the net worth method was involved, including the question of how much cash Thomas had on hand. The Court commented as follows:

> "If respondent is permitted to make an arbitrary guess as to the proper figure for the cash on hand, there would seem to be no reason as a general proposition why similar guesses should not be made as to each of the constituent elements comprising the taxpayer's net worth. Under these circumstances the entire net worth technique becomes nothing but an elaborate accounting sham lending a semblance of system and logic to a determination of deficiency which could have no greater validity than the original guesswork upon which it was based."

On page 24, appellee brands as bizarre Olender's *belated* story that he had $70,000 in hidden cash in December, 1944. There is neither anything bizarre nor belated about this claim. Evidently appellee is referring to Olender's testimony at the first trial which took place in September, 1952; but as early as 1948 both Olender contended and former Judge Monroe Friedman made an affidavit to the

effect that there was $70,000 in the safe deposit box in May of 1948, four years prior to the first trial.

According to the Government, Judge Monroe Friedman, Morris Lerman, Louis Leavy and appellant are all liars.

On page 25, appellee argues that large unrecorded deals with Goodman considered in conjunction with the use of cashier's checks and currency, indicate a probable black market source for the claimed unreported income.

It must be noted that *all the Goodman transactions were in 1944* and therefore could not have produced any increase in net worth during 1945 as his net worth at the end of 1944 would have to be increased by the cost of such suits.

There was nothing secret about the transactions. The bank had records of all purchases of cashier's checks and to whom payable.

There is no evidence of black market dealings, and even if so, here there is no evidence as to what, if any, profit was derived therefrom. In *Thomas v. Commissioner, supra,* it was claimed that as Thomas had some corporate interests this provided a likely source to account for any increase in net worth; the Court disposed of this contention as follows:

> "We think this argument assumes the very fact to be proved. There must be some independent showing that the corporation might be the source of the unreported income, not merely a negative inference arising from the prior assumption that the increases were taxable and therefore must derive from the corporation since no other taxable source is apparent."

On page 26, appellee merely asserts that it correctly took $50,000 as being the cash on hand at end of '44, that the $20,000 bonds were Olender's and not his mother's and that the $7724 check was correctly included as an asset at the end of '45. Then appellee claims the assumption as to the bonds was correct because Olender admittedly included the interest in his 1947 return and that the interest reported in 1946 of $1720.17 must have included the interest on the $20,000 bonds because it was sufficient to cover that amount, etc.[2]

On page 27, appellee concedes that under the Court's instruction to the jury the opening net worth had to be credited with $70,000 cash.

Appellee's criticism of the case of *Smith v. United States,* 348 U.S. 147, is without merit. The *Smith* case holds that no elements of the offense can be established merely by the uncorroborated extrajudicial admissions of an accused. Whether, as appellee contends, this holding does not require corroboration of every item on a net worth statement, *it certainly requires corroboration of each and every item relied on by the Government.*

Then appellee argues that the amount of cash on hand is not an element to be established by independent testimony, an argument that is in direct conflict with *Holland v. U. S.,* 348 U.S. 121; *Smith v. U. S.,* 348 U.S. 147; *Vloutis v. U. S.,* 219 F. 2d 782, and *United States v. Costello,* 221 F. 2d 668, cases cited in our opening brief. To bolster its argument appellee then refers to the use, as

[2]This contention we fully answered above in subparagraphs (7) and (11) under the heading "Appellee's Statement of the case is inaccurate and misleading."

it claims from the net worth statement, of the cash in store register, valuation of household furniture, real estate, etc. These figures were not allowed to be used by the Government because they were set forth in the net worth statement but only because they were set forth in the stipulation. (U.S. Ex. 11.)

On page 30, appellee again sets forth matters which it claims justified the finding that the $20,000 bonds were Olender's. Again no reference is made to the letters to Reed in 1946, the letters from Mrs. Olender to her son or to the inventory taken by Ringo in 1948. (See Opening Brief, pp. 76-78.)

On pages 30-31, appellee gives but a skimpy resume of the evidence relating to the 822 Goodman suits. Nowhere does appellee even consider the cost of these suits as increasing Olender's opening net worth. Granted they were purchased in early 1944 for $20,550, there is no evidence by the Government as to the sale of any of these suits; the only evidence is that of Olender, Lerman and Leavy. As none of the suits were sold in 1944, Olender's net worth must be increased by $20,550 more than contended for by the Government. Even if some were sold during that year, the proceeds must be added to Olender's assets at the end of '44.

The burden was not on Olender to establish his opening or closing net worth, or exactly how much cash he had on hand; as said in *Thomas v. Commissioner, supra,*

> "The burden upon the taxpayer is not to show the correct amount—but rather that the determination of respondent is without substantial support."

The check for $7724 was included as an asset at the end of '45 by the Government. As we have twice demonstrated, if included as an asset at the end of '45 it must be added to the opening net worth, or eliminated entirely. (See Opening Brief, pp. 73-75.)

Appellee has not answered any of the arguments, based upon cited authority, we advanced in our opening brief; nor has it even attempted to distinguish the authorities we rely upon; nor has it set forth one set of computations establishing any unreported taxable income. All it has done is to assert that from all the evidence, including guesses and suspicions, the verdicts must be upheld.

On page 29, appellee asserts that appellant does not deny a criminal intent to evade tax. Olender's pleas of not guilty and his defense constitute a complete denial.

The Government utterly failed to establish to a reasonable, or any, certainty Olender's net worth at the end of 1944 and 1945.

(c) Net Worth Increases in 1946.

Attempting to uphold the verdicts as to 1946, appellee once again ignores the record and the uncontradicted evidence and resorts to mere generalities.

As the opening net worth was never established to a reasonable certainty, the net worth at the end of 1945 was never established; *ergo,* the opening net worth for 1946 was never established.

Appellee again ignores the $20,000 bonds, the check for $7724, the question of the 822 Goodman suits in 1944, the cash expenditures made in 1945 and 1946.

Never does appellant give the cash on hand at any time credit for interest on bonds, or credit for income from Olender's Fresno property, or for gifts from his mother.

Olender testified that from his interest in the partnership properties he received $3532.57 in 1945-6 which was reported in his income tax returns (R. 612-614). (U.S. Exs. 1 and 3; Defendant's Ex. "S".) He further testified that all this money went into his safe deposit as did the interest on bonds. (R. 614.)

On page 33, appellee states that if the opening net worth is increased by allowing $70,000 cash on hand then the understatement of income for 1945 remains at $26,900; but if the $20,000 bonds and the check for $7724 is deducted *there remains no unreported income.*

Appellee argues (p. 34) that even conceding $70,000 at the end of 1944, that this amount was completely absorbed by his understatement of income for 1945. Just what is meant by this, we freely confess, is not understood by the writer. No figures are supplied for this conclusion. It is a mere assumption on the part of appellee.

Not one of our contentions contained in our opening brief, pages 83-84, have been met or answered by appellee.

(d) The Testimony of John Sanchirico Has No Probative Value and Was Erroneously Admitted.

Appellee seeks to uphold the admission of Sanchirico's testimony on various grounds. First, because it tended to impeach Olender's testimony as to how many suits he purchased in 1944. Hearsay does not become admissible merely because it may tend to impeach.

Next, appellee argues that because Goodman was dead he records of some corporation became admissible. The tatement answers itself; besides, these records were not he records of Goodman or his business.

Lastly, appellee argues that the records were admissible nder the shop book rule. These records were not records f transactions between the Seagoing Uniform Company nd Olender, they were records of transactions between ıe Seagoing Uniform Company and Goodman.

Appellee argues that we cited no authority for the bjection that these records were hearsay. No authority s needed to establish the hearsay character of transctions between third persons out of the presence and ithout the knowledge of the accused.

All of Sanchirico's testimony relating to the arrangeıents between Goodman and the Seagoing Uniform Comany was rank hearsay and never should have been adıitted in evidence. Eliminating this hearsay testimony, he records of the uniform company become valueless and ave no probative effect.

There was no evidence to show that these goods were ctually shipped; no shipping receipts or records showing harges were ever produced.

Each document was headed "Ship to George Goodman". Jnder this is a list of stores, etc.; some merely named Army and Navy Store in Oakland. Others contain in encil the words "Milt Olender", although there is no vidence to show who wrote this or when or where it was vritten.

We ask the Court to look at these United States Exıibits 66 to 71, inclusive.

Olender denied ever having received such shipments and there is no evidence that he ever did. There were no express or drayage tags produced and no receipts signed by Olender as consignee as was the case of the 822 suits purchased from Goodman in early 1944.

It is entirely probable that there was an overlapping of records and that some of these particular ones were related to the first purchase of 822 suits or the subsequent shipment of suits amounting to $1380.

Sanchirico testified that he was not there when the records were made and that the invoices were not sent to the alleged consignees, but were sent to Goodman (R. 906); *that he did not know whether the goods were actually shipped and that he was merely testifying as to custom* (R. 911). Appellant cannot be bound by such testimony or by such transactions.

CONCLUSION.

The correct record as set forth in appellant's briefs, as distinguished from the inaccurate statements of fact made by appellee, conclusively demonstrates under pertinent authorities that the Government failed to establish to a reasonable certainty or to any certainty at all the opening and closing net worths of Olender. The judgments should be reversed.

Dated, San Francisco, California,
June 25, 1956.

Respectfully submitted,
LEO R. FRIEDMAN,
Attorney for Appellant.

No. 14,916

IN THE

United States Court of Appeals

For the Ninth Circuit

MILTON H. OLENDER,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

APPELLANT'S PETITION FOR A REHEARING.

(Before Judges Healy, Chambers and Barnes.)

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(Before Judges Healy, Chambers and Barnes.)

To the Honorable William Healy, Richard H. Chambers and Stanley N. Barnes, Judges of the United States Court of Appeals for the Ninth Circuit:

Appellant hereby respectfully petitions for a rehearing of the above cause, decided September 24, 1956, on the following grounds, to-wit:

1. The opinion of this court is predicated on the erroneous assumption that appellant carried the burden of proving his innocence; whereas, the burden of proof was at all times on the Government to prove the charges.

2. The opinion erroneously uses the lack of credibility of appellant as supplying deficiencies in the government's case.

3. The opinion, in holding there was a conflict in the evidence, has failed to distinguish between uncontradicted and corroborated evidence introduced by the prosecution and evidence introduced by the defense. The Government was bound by uncontradicted and corroborated evidence which the Government had itself introduced.

4. The opinion has misconstrued and misapplied the holdings in *United States v. Calderon,* 348 U.S. 160.

5. The opinion, probably relying on the misstatements of the record in the appellee's brief, has based each of its conclusions on an erroneous premise.

6. According to the holdings in the *Holland, Smith* and *Calderon* cases the Government failed to establish the net worth of appellant for each of the years involved.

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1. THE BURDEN OF PROOF NEVER SHIFTS FROM THE PROSECUTION TO THE DEFENSE.

DISBELIEF OF DEFENDANT'S TESTIMONY DOES NOT SUPPLY DEFICIENCIES IN THE PROSECUTION'S CASE.

A reading of the opinion of this Court leads to no other conclusion than that the Court held that because appellant's testimony was not worthy of belief this justified the jury in finding appellant guilty.

Repeatedly throughout the opinion are statements that appellant gave false testimony followed by the conclusion that the government proved the net worths with reasonable certainty.

A defendant in a criminal case is not required to prove his innocence; the burden of proving the charges and each

material element thereof at all times rests upon the prosecution. As said in *Holland v. United States,* 348 U.S. 121:

> "Although it may sound fair to say that the taxpayer can explain the 'bulge' in his net worth, he may be entirely honest and yet unable to recount his financial history. In addition, such a rule would tend to shift the burden of proof. Were the taxpayer compelled to come forward with evidence, he might risk lending support to the Goverment's case by showing loose business methods or losing the jury through his apparent evasiveness. Of course, in other criminal prosecutions juries may disbelieve and convict the innocent. But the courts must minimize this danger."

Disbelief of a defendant's testimony or even the giving of false testimony does not supply deficiencies in the prosecutions proof. If a defendant's testimony is found unworthy of belief this does not establish the fact as being contrary to the testimony as given. If the testimony is true it stands as evidence establishing the fact; if untrue or unworthy of belief this merely leaves the record as if no evidence had been given on the point. (Cf. *Merritt v. Superior Court,* 93 Cal. App. 177, 269 P. 547; *Myers v. Superior Court,* 46 Cal. App. 206, 189 P. 109.)

True, the falsity of defendant's testimony can be used in determining the correctness of evidence introduced by the prosecution; but there must be evidence by the prosecution on the issue before this can be done.

A defendant cannot be found guilty unless the evidence establishes his guilt to a moral certainty and beyond a reasonable doubt. Where the evidence does not reach such

degree of certainty a conviction cannot be upheld on the falsity of the defendant's testimony. (*Olender v. United States,* 210 F. 2d 795.)

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2. **THE OPINION DISREGARDS UNCONTRADICTED EVIDENCE INTRODUCED BY THE PROSECUTION AND, IN SOME INSTANCES, FINDS DIRECTLY TO THE CONTRARY.**

THE GOVERNMENT WAS BOUND BY EVIDENCE IT HAD INTRODUCED AND WHICH NOT ONLY WAS UNCONTRADICTED BUT WAS AMPLY CORROBORATED BY OTHER EVIDENCE IN THE CASE.

As hereafter demonstrated, the opinion has disregarded uncontradicted evidence introduced by the prosecution, evidence establishing the truth of appellant's contentions. In some instances the opinion finds the fact to be directly contrary to such uncontradicted evidence, evidence which was corroborated by other evidence in the case.

The law is that the prosecution is bound by the evidence it introduces, in the absence of evidence to the contrary. Uncontradicted testimony in a case must be given weight in deciding an issue of fact, providing it is not incredible on its face.

Ariasi v. Orient Ins. Co., (9 Cir.) 50 F. 2d 548, 551;
In re Baumhauer, 179 F. 966, 968;
Jacobson v. Hahn, (2 Cir.) 88 F. 2d 433, 435;
Yellow Cab v. Rodgers, (3 Cir.) 61 F. 2d 729, 731.

The opinion has failed to apply the foregoing rules in evaluating the evidence.

3. INCORRECT STATEMENTS OF FACT IN THE OPINION ON WHICH ARE BASED THE ULTIMATE CONCLUSIONS.

Bearing in mind the foregoing rules, we now point out incorrect statements of fact in the opinion which, if corrected, must lead to a result different from that arrived at by this Court. These matters are stated in the order in which they appear in the opinion and are not arranged in the order of their relative importance.

(a) On p. 1, the opinion states that according to the Government's computations appellant and his wife should have reported net taxable income of $87,999.24 for 1945 and $43,212 for 1946. However, these computations, as contained in U. S. Exhibit 50, are based on the claimed cash on hand of $50,000 at the end of 1944 and $7200 at the end of 1945, amounts which the trial judge held could not be used for any purpose. Thus the computations are left without including any cash on hand, a matter, save as to amount, admitted by the parties.

(b) On p. 3 the opinion emphasizes the training of appellant in accounting and that he made out tax returns for his wife, mother and friends. The record shows that appellant's study of accounting took place some 30 years ago; that the accounting was merely a part of a general science course; that Olender had not taken any further instruction in accounting, etc. (Def's Ex. AD; R. 801, 841) and that he had assistance in preparing the returns. (R. 631.)

(c) On p. 3, the opinion states that Ringo the accountant "discovered records showing appellant's purchase, theretofore undisclosed to the accountant, of a single premium, fully paid, life insurance policy costing $15,933.46, in 1945."

Ringo, a Government witness, testified in reference to this expenditure "Q. Mr. Olender informed you that he had made that purchase, is that correct? A. That's correct." (R. 188.) On cross-examination Ringo again states that it was Olender who told him of this expenditure for paid up life insurance. (R. 251.)

(d) Again on p. 3, the opinion states that Olender had no record of his living expenses and could give no estimate of the cost of food for 3 people, etc.

The Government introduced as U. S. Exhibits 12 to 16, the books of account of the Army & Navy Store. In Exhibit 12 is a month by month itemization of the withdrawals by Olender for his personal expenses showing expenditures for real and personal property taxes, garage charges and repairs to auto, telephone bills, light bills, cash drawn by Olender used to pay living expenses, lodge dues, etc. (R. 655-662; 675-681.) As to estimating the cost of food, this is a matter that generally is within the peculiar knowledge of the wife of the household.

(e) On p. 4, the opinion states that the "stipulated" deductible personal expenses for cost of living for 1945 was $2,739.38, an amount less than charitable donations for that year.

These figures were agreed to by the Government in the stipulations entered into by the attorneys for the respective parties to avoid the necessity of days of proof by the Government to establish the assets and liabilities of appellant, leaving each party free to introduce evidence as to additional amounts. This cannot be used, in the circumstances, either as an admission against interest on the

part of Olender or as an attempt on his part to falsify such fact to the Government.

(f) On p. 4, the opinion discusses the estimates given by Olender to Ringo (U. S. Ex. 19) showing $50,000 and $7,000 on hand at the end of 1944 and 1945. The opinion then states that these figures were not haphazardly arrived at.

The trial judge ruled out these figures and *they could not be used by the jury and cannot be used by this Court,* though the opinion refers to them several times.

Ringo, the Government witness, testified time and again that these estimates were valueless, that he could not and did not use them in his computations and that he told the I.R. Agents that they were of no value, etc. (R. 165, 260, 268.)

(g) On p. 4, the opinion states that in the original net worth figures "appellant was hard put to explain how he accumulated large sums of cash he thereafter expended." The record is just to the contrary.

Ringo, the Government witness, who prepared the net worth statement (U. S. Ex. 10) included therein as "Cash on Hand and in Banks" the following: "(1) Cash in Vault . . . Dec. 31, 1941, $75,000" and "(1) See affidavit as to creation of this fund." Although the Government introduced this net worth statement, it never produced the affidavit referred to therein.

Ringo testified as follows: Olender had a long story as to this $75,000 and it was covered in the affidavit. (R. 160.) I brought in people to confirm what Olender said

as to his father being wealthy and had the sums available. (R. 162.) On pages 160-162 Ringo gives a long statement of Olender's account as to how he acquired the $75,000. Thus, Olender was not hard put to explain the creation of this fund.

(h) On pp. 4-5, the opinion states: "So that appellant might rebut any inference that his expenditures in 1945 and 1946 were from unreported taxable income, appellant submitted to the Government, through his auditor, an analysis of his net worth January 1, 1942 to December 31, 1947." This statement is in error.

U. S. Exhibit 10 does not purport to be an analysis of Olender's net worth from January 1942 to December 1947; it is an estimate of his net worth on December 31, 1941 and on December 31, 1947. There is nothing therein as to the intervening years.

Olender had no knowledge of what years the Government was going to proceed on against him; he did not then know that he was going to be prosecuted for the years 1945 and 1946.

Ringo further testified that he was first employed by Olender to prepare a year by year net worth statement as requested by the government agents (R. 146); that he never completed such a year by year statement (R. 147); that he never made up a net worth statement for the years 1944, '45 or '46 as he figured it was impossible (R. 233); that the net worth statement he made up was not perfect. (R. 234.)

(i) On p. 7, the opinion lays stress on the failure of Olender to produce at either trial and his inability to

remember what had become of the envelope in which he kept the $20,000 worth of bonds belonging to his mother.

As the existence of this envelope—or some other container—was established by the Government, it is immaterial that Olender did not produce the same.

Ringo, the Government witness, testified that when he went to the safe deposit he made an inventory of the contents of the box. (R. 169; U. S. Ex. 20, the inventory.) On the net worth statement (U. S. Ex. 10) in listing bonds totalling $33,000 Ringo wrote "less held for mother, purchased with her money, $20,000;" Ringo testified that he saw something on the bonds that caused him to identify them as the mother's on the inventory (R. 222); that the inventory contains the numbers and amounts of the bonds being held for her (R. 228); that the bonds had markings attached showing they were the mother's bonds. (R. 230-1.)

In reply to questions by the Court Ringo stated: I believe the bonds were in an envelope, there was something on the bonds identifying them as a group; there was something on the bonds indicating they were the mother's bonds. (R. 302.)

(j) On p. 10, the opinion states: "When the government introduced proof of likely taxable sources from which a jury can reasonably find that the net worth increases sprang, * * *".

There is absolutely no proof in the record of any likely taxable sources—either in 1945 or 1946—from which a jury or anyone else could find that any net worth increases sprang.

If the opinion is referring to the suits that came to Olender from or through Goodman, all these matters occurred in 1944 and do not establish any income for 1945 or 1946.

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4. THE OPINION HAS MISCONSTRUED AND MISAPPLIED THE HOLDING IN CALDERON v. UNITED STATES.

The opinion herein relies on the case of *Calderon v. United States,* 348 U.S. 160, as authority for the proposition that when an indictment for income tax evasion contains separate counts for different years, the evidence is sufficient if it shows an overall amount of unreported taxable income without allocating any portion thereof to any particular year. We respectfully submit that the *Calderon* case makes no such holding and the language used in the *Calderon* case must be interpreted in the light of the facts therein involved.

First, we call the Court's attention to the language of the Supreme Court in the case of *Holland v. United States,* 348 U.S. 121, 129, as follows:

> "The statute defines the offense here involved by individual years. While the Government may be able to prove with reasonable accuracy an increase in net worth over a period of years, it often has great difficulty in relating that income sufficiently to any specific prosecution year. While a steadily increasing net worth may justify an inference of additional earnings, unless that increase can be reasonably allocated to the approximate tax year the taxpayer may be convicted on counts of which he is innocent."

Clearly, the Court in the subsequent *Calderon* case never intended to abrogate the foregoing Rule.

On pages 6 and 7 of this Court's opinion, it purports to set forth the holding in the *Calderon* case as follows:

> "But one problem remains, the $17,000 hoard of cash could have absorbed the computed income deficiency for one or more of the prosecution years and respondent was convicted on all four counts. It might be argued that there must be evidence of a deficiency for *each* of the years here in issue. There is no merit in this contention. The evidence need not comply with the niceties of the annual accounting concept."

The foregoing *is an incomplete and incorrect quotation from the case.* The full and complete language in the *Calderon* case (348 U.S. at 168) is as follows:

> "The $17,000 hoard of cash could have absorbed the computed income deficiency for one or more of the prosecution years, and respondent was convicted on all four counts. It might be argued that independent evidence showing a $30,000 deficiency is not enough—that there must be evidence that this sum resulted in a deficiency for *each* of the years here in issue. There is no merit in this contention. In the first place, this evidence is merely *corroborating* respondent's cash-on-hand admissions and need not comply with the niceties of the annual accounting concept. While the evidence as a whole must show a deficiency for each of the prosecution years, the corroborative evidence suffices if it shows a substantial deficiency for the over-all prosecution period. Independent evidence that respondent understated his income by $30,000 in the same four-year period for

which respondent's extrajudicial admissions tended to show a $46,000 deficiency is adequate corroboration."

Thus, the correct rule as announced in the *Calderon* case is that the evidence must show a deficiency for each of the prosecution years, corroborated by proof of a substantial over-all amount of unreported taxable income.

In footnote 3 of the *Calderon* case is set forth the computations which show that based on the Government's contention of only $500 cash on hand at the outset, the evidence shows a four-year net worth increase of $46,218 in excess of declared income. If the defendant's testimony was accepted of $17,000 cash on hand at the outset there was still a deficiency of $37,470.00.

In the instant case we have no such situation. The figures of $50,000 and $7200 could play no part in the Government's computations nor in the deliberations of the jury. Either the evidence established over $70,000 in cash at the opening net worth period or the amount of cash on hand remained in the realm of surmise and conjecture with an admission by the Government of a large amount of such cash though undetermined.

This Court relies on the *Calderon* case as establishing that the proof of unrecorded amounts of income lent corroboration to certain extrajudicial admissions of the defendant and support the Government's contention. The facts in the *Calderon* case established a loss of books and records showing income and that this absence of books based upon the other books produced was sufficient to justify the inference of unreported income during such interim of time. Here, we have no such situation. There

is no evidence in the case showing the receipt by Olender in either 1945 or 1946 of any unreported income or of any source from which such income could be produced.

Lastly, this Court relies on the *Calderon* case as holding that the computed income deficiency for one or more of the prosecution years could have absorbed the cash on hand at the outset. In the *Calderon* case appellant's claimed hoard of $17,000 was absorbed by the establishment of proof of equipment which accounted for nearly all of the claimed cash on hand, there being other proof of excessively large expenditures over and above this amount. Here, we have no such situation. On page 15 of appellee's brief the Government admits, assuming Olender had $75,000 in 1943, that at the end of 1944 he would have had $61,000 in cash and this irrespective of any gifts from Olender's mother. The cash expenditures in 1945 could have only come out of Olender's safe deposit box, and were far less than the $70,000 odd dollars claimed by appellant and the same is true in computing the figures for 1946.

Furthermore, in the *Calderon* case there was in the record defendant's extrajudicial statement that he only had $500 in cash at the outset; at a prior trial he testified that he had $2,000 to $9,000 while at the last trial he raised this amount to $17,000.

Here, there is no extrajudicial statement of $50,000 in the record. The trial Court struck out this figure and held it could not be used for any purpose Defendant's testimony at his first and second trial as to the cash on hand at the outset was the same.

The *Calderon* case was dealing only with the corroboration of extrajudicial admissions of the defendant. Here, there were no extrajudicial admissions as to cash, therefore, there could be no corroboration of such a statement.

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5. INSUFFICIENCY OF THE EVIDENCE.

Bearing in mind the foregoing matters and things, it should be manifest that the opinion of this Court is contrary to the holding in the *Holland* and *Calderon* cases.

There was no evidence establishing the opening net worth of defendant. That he had a large amount of cash on hand stands admitted; either his testimony must be accepted or this amount remains undetermined. The opening net worth not being established, the net worth at the end of 1945 also remained unestablished.

As to the bonds, there is no evidence in the case establishing or from which it could be legally and logically inferred that the bonds belong to the Olenders. The only testimony that could possibly be construed against the mother's ownership of the bonds is that they were purchased by the defendant, were in a safe deposit box and for one year he reported the income thereon. All other evidence in the case is substantial and without conflict that the bonds were purchased for the mother and with her money. This was reported to the Government in 1946; the bonds were sold and the amount deposited in the mother's estate. The letters of the mother are clear that he was to buy the bonds with her money, for her, and to keep them for her.

Even the Government in preparing its case practically admitted that these were the mother's bonds. When Agent Whiteside was on the stand he was asked what effect it would have on the Government's computations if this $20,000 of bonds actually belonged to the mother. (Record 461.) Whiteside testified that prior to the second trial he made such a computation. (Record 458, 481.) The Government established that in 1948 Ringo saw these bonds in the safe deposit box in a separate package or container on which there was a separate identification that the bonds belonged to Olender's mother. The Government also proved that in the Federal Estate Tax Return (U. S. Exhibit 52) for the past few years interest on bonds equalling $20,000 had been included as income in Mrs. Olender's income tax returns.

As to the $20,550 worth of Goodman sailor suits, the Government established the purchase of these suits in early 1944. No evidence as to the disposal of these suits was introduced other than defendant's explanation fully corroborated by the testimony of Lerman and Levy. Either Olender had these suits at the end of 1944 or, if we assume they were sold, he had the proceeds of such sales. In either event his opening net worth must be increased by at least this sum of $25,550.

As to the $7,724 item, this likewise was traced through the testimony of Olender, Levy and the account books of Saraga. As this amount arose out of a transaction in 1944, it could not be used as an asset at the end of 1945 unless it was added as an asset at the end of 1944.

For the foregoing reasons it is respectfully submitted that a rehearing herein be granted in order that the

opinion may be corrected to conform with the record and that when the same is done the judgments be reversed.

In the event of a denial of this petition, appellant intends to apply to the Supreme Court of the United States for a writ of certiorari and, therefore, prays for a stay of mandate of this Court for thirty days in order to enable appellant to make such application.

Dated, San Francisco, California,
October 23, 1956.

Respectfully submitted,
LEO R. FRIEDMAN,
Attorney for Appellant
and Petitioner.

CERTIFICATE OF COUNSEL

I hereby certify that I am counsel for Appellant and Petitioner in the above cause and that in my judgment the foregoing Petition for a Rehearing is well founded in point of law as well as in fact and that said Petition for Rehearing is not interposed for delay.

Dated, San Francisco, California,
October 23, 1956.

LEO R. FRIEDMAN,
Counsel for Appellant
and Petitioner.